

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER, APPELLANT,

vs.

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW
YORK

FILED DECEMBER 2, 1954

PROBABLE JURISDICTION NOTED FEBRUARY 7, 1955

SUPREME COURT OF THE UNITED STATES

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**SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS**

Index No. 15647 1952

In the Matter of the Application of VERA SHILAKMAN,
Bernard F. Riess, Harry Slochower, Sarah R. Reidman,
Henrietta A. Friedman and Melba Phillips, Petitioners,
for an Order Pursuant to Article 78 of the Civil Practice
Act,
against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,
Respondent; Annulling the Dismissal of Petitioners from
Their Positions as Teachers in the Colleges of the City
of New York and Directing Their Reinstatement Forth-
with Without Prejudice to Their Rights and Status as
Though Such Dismissals Had Never Occurred

NOTICE OF APPEAL TO APPELLATE DIVISION—December 19,
1952

SIR:

Please take notice that petitioners above named hereby
appeal to the Appellate Division, Second Department, from
the order of the Supreme Court, Kings County, entered in
the office of the Clerk of Kings County on the 12th day of
[fol. 8] December 1952 denying their application for an
order pursuant to Article 78 of the Civil Practice Act and
dismissing their petition herein and from the whole and
each and every part of said order.

Dated: New York, December 19, 1952.

Yours, etc., Witt & Cammer, Attorneys for Peti-
tioners, Office & P. O. Address, 9 East 40th Street,
New York 16, New York.

To Denis M. Hurley, Esq., Corporation Counsel, Attorney
for Respondent, Municipal Building, New York 7, New
York. Francis J. Sinnott, County Clerk, Kings County.

[fol. 9] IN SUPREME COURT OF NEW YORK, SPECIAL TERM,
PART I

ORDER APPEALED FROM—December 11, 1952

Present: Hon. Frank E. Johnson, Justice

The petitioners above named having applied to this Court for an order pursuant to Article 78 of the Civil Practice Act, requiring and compelling the respondent, The Board of Higher Education of the City of New York, to annul the termination of the employment of petitioners as teachers in the colleges of the City of New York and directing respondent to reinstate them to said positions without prejudice to their seniority, pension, promotion rights and other status as such teachers as though their employment had never been terminated, with back salary, and for other relief.

Now, upon reading and filing the petitioners' notice of application dated November 18, 1952, the petition verified by each of the above-named petitioners on November 18, 1952, together with Exhibit A thereto annexed, submitted in support of said motion, and the respondent's answer verified November 24, 1952, together with Exhibit A thereto annexed, submitted in opposition to said motion, and after hearing Witt & Cammer, Esqs. (Harold L. Cammer, Esq., [fol. 10] of counsel), attorneys for the petitioners, in support of said application, and Denis M. Hurley, Corporation Counsel (Michael A. Castaldi, of counsel), attorney for respondent, in opposition thereto, and after due deliberation, and upon filing the opinion of the court, it is

Ordered that the application be and the same hereby is denied, and it is further

Ordered that the petition be and the same hereby is dismissed.

Enter.

F. E. J., J. S. C.

Granted Dec. 11, 1952. Francis J. Sinnott.

[Title omitted]

NOTICE OF APPLICATION—November 18, 1952

SIRS:

Please Take Notice that upon the annexed petition of Vera Shlakman, Bernard F. Riess, Harry Slochower, Sarah H. Riedman, Henrietta A. Friedman, and Melba Phillips, duly verified November 18, 1952, and the exhibits thereto annexed, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the Courthouse, Municipal Building, in the Borough of Brooklyn, City of New York, on the 25th day of November, 1952, at ten o'clock in the forenoon for an order pursuant to Article 78 of the Civil Practice Act:

1) Requiring and compelling respondent Board of Higher Education of the City of New York to annul the termination of the employment of petitioners as teachers in the colleges of the City of New York;

2) Directing respondent to reinstate petitioners to said [fols. 10b-12] positions without prejudice to their seniority, pension, promotion rights, and other status as such teachers as though their employment had never been terminated, with back salary from the date of such termination to the date of their reentry into service in accordance with the order to be entered herein; and

3) Granting such other and further relief as to the Court may seem just and proper.

Dated, New York, November 18, 1952.

Yours, etc., Witt & Cammer, Attorneys for Petitioners,
Office & P. O. Address: 9 East 40th Street,
Borough of Manhattan, City of New York.

To The Board of Higher Education of the City of New York, 695 Park Avenue, New York 21, New York, Respondent; Denis M. Hurley, Esq., Corporation Counsel, Municipal Building, New York 7, New York, Attorney for Respondent.

4
[fol. 12a] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

[Title omitted]

PETITION November 18, 1952

To the Supreme Court of the State of New York:

The petition of Vera Shlakman, Bernard F. Reiss, Harry Slochower, Sarah R. Riedman, Henrietta A. Friedman, and Melba Phillips, respectfully shows and alleges:

1. Petitioners are residents and citizens of the State of New York.

2. Respondent, hereafter called the Board, is the corporate body organized pursuant to the Education Law of the State of New York, which is required to conduct and administer that part of the public school system of the City of New York which is of collegiate grade.

3. This is a proceeding under Article 78 of the Civil Practice Act to review and vacate the action of the Board in terminating the employment of petitioners, under circumstances hereafter set forth, for alleged violation of [fol. 12b] Section 903 of the Charter of the City of New York, hereafter called Section 903. Section 903 provides as follows:

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and

such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

4: Each of petitioners was duly appointed to the position of teacher in the colleges of the City of New York many years ago and had been a teacher continuously thereafter until the termination of his or her employment, as hereinafter set forth. At the time of the termination of their employment, petitioners were teachers with tenure, employed by the Board as follows:

a) Petitioner Vera Shlakman was an assistant professor of economics at Queens College and had been a college teacher for fourteen years;

b) Petitioner Bernard P. Riess was an associate professor of psychology at Hunter College and had been a college teacher for twenty-four years;

c) Petitioner Harry Slochower was an associate professor of German at Brooklyn College and had been a college teacher for twenty-seven years;

d) Petitioner Sarah R. Riedman was an assistant professor of physiology at Brooklyn College and had been a college teacher for twenty-six years;

e) Petitioner Henrietta A. Friedman was an instructor of classics at Hunter College and had been a college teacher [fol. 12c] for twenty-five years;

f) Petitioner Melba Phillips was an assistant professor of physics at Brooklyn College and had been a college teacher for fourteen years except that she was on official leave during the period from 1941 to 1944.

5. On September 8, 1952, The Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, a subcommittee of the Committee on the Judiciary of the Senate of the United States, hereafter called the Subcommittee, opened hearings in the City of New York. At the outset of said hearings, Senator Homer Ferguson, sitting as the Subcommittee, stated that "education is primarily state and local function" into which the Subcommittee had no desire to and did not intend to intrude and that "the subcommittee has limited itself to considerations affecting national security, which are directly

within the purview and authority of the Subcommittee." Thereafter at a continued hearing on October 13, 1952, in response to a request for further clarification of the purpose of the investigation with reference to the language of Section 903, Senator Ferguson further stated that it is "a fair statement" that the Subcommittee was "not concerned with this from the point of view of a local problem, and particularly from the point of view of the property, government, or the affairs of the city, or the nomination, election, or appointment or official conduct of the city employees."

6. On September 24, 1952, petitioners Vera Shlakman, Bernard F. Riess, and Harry Slochower, and on October 13, 1952, petitioners Sarah R. Riedman, Henrietta A. Friedman, and Melba Phillips, appeared before the Subcommittee pursuant to subpoena.

[fol. 12d]. 7. Upon their appearances before the Subcommittee, petitioners were asked some questions concerning their employment by the Board, including such questions as the nature of their employment, the length of their employment, the places of their employment, the subjects they taught, and their extra-curricular activities as teachers. Petitioners answered all such questions.

8. Petitioners were also asked questions relating to the personal associations and affiliations and the political, social, and economic views and opinions of themselves and their parents, wives, brothers, sisters, and acquaintances.

9. Petitioners answered some and refused to answer others of the questions referred to in paragraph 8 on various and numerous grounds, including the ground that the Subcommittee had not jurisdiction to inquire into such matters, the ground that the First Amendment to the Constitution of the United States forbade such inquiry, the ground that the procedures of the Subcommittee violated their rights under the Fifth Amendment to the Constitution of the United States and that they could not be required under the Fifth Amendment to answer such questions, and on other grounds. The Subcommittee acquiesced in the refusal of petitioners to answer such questions.

10. In their appearances before the Subcommittee, petitioners at no time refused to answer any questions regarding the government, property, or affairs of the city or of

any county or regarding their official conduct as employees of the Board.

11. At the time of their appearances before the Subcommittee, petitioners did not refuse to answer any questions regarding the government, property, or affairs of the [fol. 12c] city or of any county or regarding their official conduct as employees of the Board on the ground that the answer thereto might tend to incriminate them.

12. On October 3, 1952, petitioners Vera Shlakman, Bernard F. Riess, and Harry Slochower were advised by the respective presidents of the colleges at which they taught that they were suspended as of the close of business that day because of the provisions of Section 903. On October 6, 1952, the Board by resolution declared the positions of petitioners vacant and terminated their employment as of the close of business October 3, 1952. A true copy of said resolution is annexed hereto as Exhibit A, and made part hereof. On October 28, 1952, petitioners Sarah R. Reidman, Henrietta A. Friedman, and Melba Phillips were similarly suspended by the respective presidents of the colleges at which they taught on the same ground. On November 17, 1952, the Board by resolution declared the positions of said petitioners vacant and terminated their employment as of the close of business October 28, 1952. A true copy of said resolution is annexed hereto as Exhibit B, and made part hereof.

13. Before the suspension and termination of their employment as set forth in paragraph 12, none of the petitioners was served with charges nor given notice of a hearing and an opportunity to be heard by the Board, as provided for teachers with tenure by the Education Law.

14. The action of the Board in applying Section 903 to terminate the employment of petitioners as aforesaid violates Article XI, Section 4, and Article IX, Section 13B, of the Constitution of the State of New York which provide that education is exclusively a state function concerning which the city may not legislate.

[fol. 12f] 15. The action of the Board in construing and applying Section 903 of the City Charter (which is, by section 2, subdivision 1 and section 21 of the Home Rule Law a local law which cannot have the effect of superseding state legislation or of affecting the maintenance, support

or administration of the school system) was further unlawful in that

a) It is inconsistent with and vitiates the provisions protecting the tenure of teachers contained in the Education Law, particularly insofar as such provisions specifically require that they "shall not be so interpreted as to constitute interference with academic freedom".

b) It is inconsistent with and vitiates the provisions of the Education Law which require charges, notice, and a hearing as preconditions to the dismissal of teachers with tenure.

c) It is inconsistent with and vitiates the provisions of sections 25 and 26-a of the Civil Service Law which forbid inquiry into or response to questions pertaining to the political affiliations, associations, views, or opinions of a civil servant as a condition of public employment under penalty of misdemeanor.

16. The action of the Board in applying section 903 is further unlawful in that

a) Petitioners, as teachers employed by the Board, were and are not employees of the City of New York, and

b) The Board as a body corporate created by and responsible to the state, is not an agency of the City of New York.

[fol. 12g] 17. The action of the Board in construing and applying Section 903 in the aforesaid manner

a) Violates the law of the land clause of Article I, section 1, of the Constitution of the State of New York and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

b) Deprives petitioners of the rights and privileges guaranteed by Article I, section 1, of the Constitution of the State of New York and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

c) Violates Article I, Sections 8 and 9, of the Constitution of the State of New York and the First and

Fourteenth Amendments to the Constitution of the United States.

d) Violates Article V, section 6, of the Constitution of the State of New York which prescribes merit and fitness as the sole tests in civil service without regard to political associations, affiliations, views, or opinions.

18. Even if Section 903 were otherwise applicable to teachers employed by the Board, the action of the Board in applying Section 903 in the circumstances was unlawful, unjust, arbitrary, and capricious in that

a) The Subcommittee was not authorized to conduct an inquiry regarding the property, government, or affairs of the City or the official conduct of petitioners as employees of the Board.

b) Whether authorized or not, the Subcommittee disclaimed that it was conducting an inquiry regarding the property, government, or affairs of the city or [fol. 12h] into the official conduct of petitioners.

c) Whether authorized or not, the Subcommittee was not engaged in an inquiry regarding the property, government, or affairs of the city or into the official conduct of petitioners.

d) Petitioners did not refuse to answer any questions regarding the government, property, or affairs of the city or their official conduct as teachers.

e) Petitioners did not refuse to answer any questions regarding the government, property, or affairs of the city or their official conduct as teachers on the ground that the answers thereto might tend to incriminate them.

f) Petitioners could not be compelled to and were, in fact, forbidding to answer the questions which they refused to answer as a condition of obtaining or retaining employment by the Board by reason of the provisions of sections 25 and 26-a of the Civil Service Law, which forbid inquiry into political affiliations, associations, views, or opinions as a condition of public employment in the state.

19. Even if section 903 were otherwise applicable to teachers employed by the Board, petitioners, as teachers

with tenure were nevertheless entitled to charges, notice, and an opportunity to be heard before their dismissals could be effected.

[fol. 126-127] Wherefore petitioners respectfully pray that the relief sought in the prefixed notice of application be granted as prayed for.

Dated, New York, November 15, 1952.

Vera Shlakman, Bernard F. Riess, Harry Slochower,
Sarah R. Riedman, Henrietta A. Friedman, Melba
Phillips. Duly sworn to by Vera Shlakman, et al.
Jurats omitted in printing. (All in italics)

[fol. 128]

EXHIBIT A, TO PETITION

Resolution Passed by the Board on October 6, 1952,
Calendar No. 1

Whereas, under date of September 24 and 25, 1952, Vera Shlakman, Bernard F. Riess and Harry Slochower testified before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary of the United States Senate, and

Whereas, on Page 178 of the transcript of the testimony of Vera Shlakman, Counsel for the Committee asked her whether she ever had been a member of the Communist Party and she concluded her answer to this question as follows:

"On that ground, on the First Amendment, that is, and on the Fifth and Sixth I will decline to answer.

Senator Ferguson: I will sustain it on the Fifth Amendment."

[fol. 129] and Page 179 of the transcript of her testimony indicates that she was asked by Counsel:

"Have you ever been a member of the Communist Party?

Miss Shlakman: On the grounds previously stated I would decline.

Senator Ferguson: Sustained.

Mr. Morris: Are you a member of the Executive Board of the Teachers' Union?

Miss Shlakman: Yes.

Mr. Morris: As such, have you ever attended a Communist Caucus meeting?

Miss Shlakman: On the grounds previously stated, I will refuse to answer.

Senator Ferguson: Sustained, on the Fifth Amendment."

and

Whereas, Page 193 of the transcript of the testimony of Bernard F. Riess indicates that he was asked by Counsel to the Committee:

"Have you ever been a member of the Communist Party?"

and after asserting various reasons for refusing to answer that question, all of which appear to have been overruled, Mr. Riess stated on Page 196:

"I understand, but they are still part of my reasons; the Constitutional reasons under the First and Fifth Amendments.

Senator Ferguson: Under the Fifth Amendment, I will sustain your objection."

[fol. 130] After answering various questions concerning his membership or association with several organizations and persons, the following testimony took place (Pages 203-204):

"Mr. Morris: Have you ever used an alias, Professor?

Mr. Riess: That again is one of those questions to which I would like to seek some protection in the First and Fifth Amendments.

Senator Ferguson: Do you claim the Fifth Amendment on that?

Mr. Riess: The First and Fifth.

Senator Ferguson: I will sustain it under the Fifth Amendment, that it may tend to incriminate you.

Mr. Morris: I have no further questions.

and

Whereas, the transcript of the testimony of Harry Slochower shows that Counsel to the Committee asked him whether at that time (the 1940-1941 Rapp-Coudert Hearings) he was a member of the Communist Party (Transcript, Page 241), and after some colloquy, Counsel asked:

"The question is whether or not you were at that time when you were investigated in another investigation, and I would like to know whether or not you were at that time a member of the Communist Party."

After further colloquy, the following testimony appears:

[fol. 131] "Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question: Were you at the time you are referring to, when you state some charge was made against you—were you at that time a member of the Communist Party?"

The witness' refusal to answer that question on the basis of the First Amendment was overruled by the Committee. Mr. Slochower then testified (Transcript, Page 244):

"Okay, sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or 1941. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that Committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer."

Again, at pages 246 and 254, it appears that the witness refused to answer questions on the basis of the Fifth Amendment concerning past membership in the Communist [Vol. 132] Party. At Page 254, Counsel to the Committee asked the witness whether he had ever used an alias. After some colloquy, the following appears in the transcript (Page 255):

Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.

Mr. Slochower: That is, whether I was known under any other name. Again for very good reasons, which do not imply guilt.

and

Whereas, the Corporation Counsel has advised the Board that the refusal to answer questions on the only ground which was sustained, namely, the Fifth Amendment, constitutes a refusal to answer the respective questions on the ground of self-incrimination, and

Whereas, the Corporation Counsel has further advised that questions directed to an employee of this Board concerning past or present membership in the Communist Party constitute an inquiry into the employee's official conduct within the purview of New York City Charter, Section 903, and

Whereas, Section 903 provides as follows:

Section 903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearings or [fols. 133-138] inquiry, or having appeared shall refuse to testify or to answer any questions regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in rela-

tion to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

and

Whereas, the Presidents of Queens College, Hunter College and Brooklyn College have advised this Board of the suspension of Professors Vera Shlakman, Bernard F. Riess and Harry Slochower, effective as of the close of business, October 3, 1952, and have reported their action to this Board,

Therefore be it resolved, that the positions of Vera Shlakman as Assistant Professor at Queens College, Bernard F. Riess as Associate Professor at Hunter College, and Harry Slochower as Associate Professor at Brooklyn College, are declared vacant and that their employment is hereby terminated effective as of the close of business October 3, 1952, pursuant to the provisions of Section 903 of the New York City Charter.

[fol. 138a] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

[Title omitted]

ANSWER

The respondent for its answer to the petition herein by Denis M. Hurley, Corporation Counsel, its attorney, alleges:

First: Denies each and every allegation contained in paragraph "5" thereof, except admits that on September 8, 1952, the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, a subcommittee of the Committee on the Judiciary of the [fol. 138b] Senate of the United States, opened hearings in the City of New York and that at the outset of said hearings,

Senator Homer Ferguson, sitting as the subcommittee, stated:

"The Committee will come to order. The United States Senate Internal Security Subcommittee, of the Committee on the Judiciary, is now in session."

"We are here today to take testimony relating to subversion in our educational process. The training of our youth today determines the security of the nation tomorrow. The nature of this inquiry will be national in scope, and will relate to determine whether or not organized subversion is undermining our educational system."

"We shall endeavor to sketch a broad general picture, leaving the determination of individual cases to state and local authorities."

"The subcommittee gives full recognition to the fact that education is primarily a state and local function. Hence, the subcommittee has limited itself to considerations affecting national security, which are directly within the purview and authority of the subcommittee."

"The Internal Security Subcommittee of the Senate Judiciary Committee, was empowered on December 31, 1950, under the terms of the Senate Resolution 366 of the Eighty-first Congress, to make a complete and continuing study and investigation of, first, the administration, operation, and enforcement of the Internal Security Act of 1950; secondly, the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; thirdly, the extent, nature and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of foreign government organizations, or organizations controlled by the world communist movement, or any other movement seeking to overthrow the Government of the United States by force and violence."

[fol. 138c] This authority was subsequently extended under resolution No. 7 of the Eighty-Second Congress, until December 31, 1952."

The respondent further admits that at a continued hearing on October 13, 1952, the following colloquy ensued between members of the Subcommittee and Harold Cammer, Esq., the attorney for a witness then being interrogated:

Mr. Cammer: Mr. Morris, not by way of objection but only by way of clarification, at the opening of this hearing.

Senator Ferguson: I think, Mr. Chairman, that counsel should confer with his client.

Senator Smith: He is fixing to ask us a question about procedure.

Mr. Cammer: I have discussed this with Mr. Morris.

Senator Ferguson: Is this something about procedure of the hearing?

Mr. Cammer: Yes sir, it is. It is not related to her answer and I am not attempting to lay any foundation for an objection or complaint about the question. I am not approaching it in that sense at all, Senator. I am simply asking for clarification of an issue which has arisen and concerning which there has been some confusion.

When you opened this hearing you did say that the purpose of this investigation was a federal purpose. I am not objecting to that, with the view of carrying out the legislative intent, of, perhaps, framing some legislation. I simply wanted to ask Mr. Morris whether this inquiry is concerned with the property, government or affairs of the City of New York, or the nomination, election, appointment or official conduct of any employees of the City of New York.

Mr. Morris: I think you should direct that question to the chair.

Senator Smith: I would say that any information or evidence that comes out in this hearing should be available to the good officers of any group in American government, wherever it may be used. We are not trying to circumscribe or narrow the use that may be made of this evidence. So I do not think we can be [fol. 138d] expected to do that, and I do not see any need for as to attempt to delimit the terms under which this evidence may be used.

Mr. Cammer: I am not attempting to limit it, Senator. I do know, and I understood from Senator Ferguson, that this was a federal committee not concerned with local affairs or local problems. Again I emphasize this is not by way of an objection. I thought Senator Ferguson had made it pretty plain that you were not concerned with the property, affairs, or government of the city, or with the nomination, election, appointment or official conduct of city employees.

Senator Ferguson: Our questions aren't aimed at that.

Senator Smith: We are just trying to get the facts, the truth about these matters. We are inquiring about them.

Senator Ferguson: But as to whether or not she belonged to this organization, if she was a member and answered the question, then she might tell us all about it and we could tell, them, how it applied to the federal questions involved.

Mr. Cammer: Precisely that is what I thought you had in mind, and I felt in my own mind that you were not concerned with this from the point of view of a local problem, and particularly from the point of view of the property, government, or the affairs of the city, or the nomination, election or appointment or official conduct of the city employees. I understood you to say that right at the opening of the hearing.

Senator Ferguson: I think that is a fair statement, that we are not trying to dictate to the school board who they shall have as teachers, what they shall teach. But we do think that the security of this nation is determined by what teachers do teach, whether or not they follow the Communist line in teaching, whether or not they are members of the Communist Party, because the evidence seems to indicate clearly, up to date at least, and it has not been disputed by those who have been Communists, that the Communists owe allegiance to the Soviet Union and the Communist Party, and that when it conflicts, in any way with the United States [fol. 138e] Government or the people, that Communism

and Russia controls their thinking. I think that is very material as to our security.

Mr. Cammer: Yes. And whether the world's mind is going to be enslaved.

Senator Smith: I am not going to limit the questions I ask to any federal level. I think that anybody who is entitled to use this information who wants to use it, he is entitled to use it. This is an open hearing and I think it the American tradition of open hearings, with counsel present, I have no desire other than to see that every person, no matter what I may think about their actions, has a chance to defend themselves according to their Constitutional rights. I don't know what your purpose is in referring to federal level continually, but I have a suspicion in my mind why you want us to delimit it to the federal level. It is coming out, as I understand, for use, as every good citizen in America ought to want it to be used, for whatever purpose they want it for."

Second: Denies each and every allegation contained in paragraphs "7", "8" and "9" thereof, except refers to the photostatic copy of the certified transcript of the testimony of the said witnesses hereto annexed as Exhibit "A" for the text and legal effect thereof.

Third: Denies each and every allegation contained in Paragraphs "10" and "11" thereof.

Fourth: Denies each and every allegation contained in paragraph "14" thereof, except refers to Article XI Section 1, and Article IX, Section 13-b of the Constitution of the State of New York, for the text and legal effect thereof. [fol. 138f] Fifth: Denies each and every allegation contained in Paragraphs "15", "16", "17", "18" and "19" thereof.

Further Answering the Petition and for a First, Separate and Complete Defense Thereto, Respondent Alleges:

Sixth: On September 24, 1952, petitioners Vera Shlakman, Bernard F. Riess and Harry Slochower and on October 13, 1952, petitioners Sarah R. Riedman, Henrietta A. Friedman and Melba Phillips, pursuant to subpoenas duly served

upon each of them, appeared before the Internal Security Subcommittee of the Committee on the Judiciary, United States Senate, at hearings held in New York City. After being duly sworn, each of the petitioners was asked various questions in the course of said hearings, including questions as to whether he was or ever had been a member of the Communist Party. Each petitioner refused to answer said question or questions on the ground that his answers might incriminate him, all of which is fully set forth in a photostatic copy of the certified transcript of petitioners' testimony at said hearing, a copy of which is annexed hereto as Exhibit A and made a part hereof.

[fol. 139] Seventh: Part of the said testimony of the respective petitioners in the order in which said petitioners appeared before the Subcommittee is set forth herein, verbatim, as follows:

Vera Shlakman on September 24, 1952.

Mr. Morris: Miss Shlakman, have you ever been a member of the Communist Party?

Miss Shlakman: Mr. Morris, I find it extraordinarily difficult to face my students with whom I have been concerned, particularly in recent weeks, in accordance with prescribed syllabus, to discuss the question of the role in the maintenance of self-government. It seems to me that a maintenance of the rule of free inquiry necessary to the preservation of self-government—I am getting involved in this sentence, but what I am getting at is, that the question is such as to destroy the rule of free inquiry, and therefore to challenge, to impair self-government.

[fol. 140] On that ground, on the First Amendment, that is, and on the Fifth and Sixth I will decline to answer.

Senator Ferguson: I will sustain it on the Fifth Amendment.

Mr. Morris: Have you ever been a member of the Communist Party?

Miss Shlakman: On the grounds previously stated I would decline.

Senator Ferguson: Sustained.

Mr. Morris: Are you a member of the Executive Board of the Teachers Union?

Miss Shlakman: Yes.

Mr. Morris: As such, have you ever attended a Communist caucus meeting?

Miss Shlakman: On the grounds previously stated, I will refuse to answer.

Senator Ferguson: Sustained, on the Fifth Amendment.

Bernard F. Riess on September 24, 1952

Mr. Morris: Have you ever been a member of the Communist Party?

Mr. Riess: I would like to answer that by saying that, as a psychologist, I have an obligation to the profession which I represent. That profession is definitely on record as having objected to such questions, when they were asked about staff members at the University of California, when they were asked about visitors in this country from abroad, as psychologists, who were invited to an International [fol. 141] gathering of psychologists; and I certainly would object to that question as being asked of myself.

Senator Ferguson: I cannot recognize those reasons for refusal. They are not legal.

Mr. Riess: They are principled objections.

Senator Ferguson: They are not legal objections.

Mr. Riess: If I am forced to invoke the legal reason—

Senator Ferguson: You are not forced to do anything, you understand.

Mr. Riess: I am proceeding to elaborate on other reasons. As a college teacher, I believe that the American Association of University Professors has objected to anything of this sort. I think I would be betraying college teachers in answering.

Senator Ferguson: Do I understand that you believe that these teachers who come in here and say that they have never been members of the Communist Party are violating the Code of Ethics of the Teaching Profession?

Mr. Riess: I believe that they are weakening it.

Senator Ferguson: They are violating the principles and ethics of the college professors?

Mr. Riess: I think so.

Senator Ferguson: To admit that they are not members of the Communist Party?

Mr. Riess: Under the present circumstances, and with the attitudes and hysteria of today, I think that is undoubtedly true.

Senator Ferguson: So you think that the American Youth ought to be taught that the college profession stands for the principle that anyone who admits that they are [fol. 142] not members of the Communist Party and have never been, is violating the ethics of that high profession?

Mr. Riess: I don't think that is the implication I would draw from what I said.

Senator Ferguson: Do you not think that is what the public will draw?

Mr. Riess: I am afraid that that is the impression that is going to be created to the public.

Senator Ferguson: Your answer, from your answer. Isn't that what you told me, that you believed the ethics of the profession said a man should not answer the question?

Mr. Riess: I said the ethics of the profession would be violated if a man under pressure had to testify about his political beliefs. I do not think this is a function of a college teacher.

Senator Ferguson: Do you say that it is only a political party, the Communist Party?

Mr. Riess: It is recognized as such by the laws of the United States.

Senator Ferguson: That was not my question. My question was: Is it in your opinion only a political party?

Mr. Riess: As far as I know its operations, as far as I have read and heard about it, it is to me a political party.

Senator Ferguson: And only a political party?

Mr. Riess: And only a political party.

Mr. Morris: I do not think that he has answered the question: Have you ever been a member of the Communist Party?

Mr. Riess: I was going to ask whether I could add to those reasons?

Mr. Morris: All of which have been overruled.

[fol. 143] Mr. Riess: I understand, but they are still part

of my reasons; the Constitutional reasons under the First and Fifth Amendments.

Senator Ferguson: Under the Fifth Amendment, I will sustain your objection.

Mr. Morris: Have you ever used an alias, Professor?

Mr. Riess: That again is one of those questions to which I would like to seek some protection in the First and Fifth Amendments.

Senator Ferguson: Do you claim the Fifth Amendment on that?

Mr. Riess: The First and Fifth.

Senator Ferguson: I will sustain it under the Fifth Amendment, that it may tend to incriminate you.

Mr. Morris: I have no further questions.

Senator Ferguson: That is all.

Harry Slochower on September 24, 1952

Mr. Morris: Were you mentioned in the 1940-1941 hearings, or identified in the hearings of the New York Legislative Committee, as a Communist?

Mr. Slochower: I wasn't present there when the testimony was given, but I was told that one of my colleagues by the name of Bernard Grebanier had mentioned the fact that I was, had been or was a member of the Communist Party.

Mr. Morris: Were you called in as a witness in that inquiry?

Mr. Slochower: You mean before the Rapp-Coudert? Oh, yes,—twice. Once it was a meeting with—well, yes; there [fol. 144] was an investigation. It was a private hearing, though. It never became public.

Mr. Morris: Were you at that time a member of the Communist Party?

Mr. Slochower: Well now, Mr. Morris, if you allow me to answer this question fully, I will have to begin with a literary allusion.

Mr. Morris: Well, it calls for a Yes or No answer, unless you want to invoke some kind of privilege.

Mr. Slochower: This is a very serious and I think you ought to allow me a little leeway. I beg your indulgence.

Senator Ferguson: I might ask this: Are you going to answer the question?

Mr. Slochower: I am going to answer, in my way.

Senator Ferguson: That is what I mean. You are going to answer the question?

Mr. Slochower: I am going to answer in my way; yes. I am going to communicate to you with respect to the question which you put.

Senator Ferguson: As to whether or not you ever were a Communist?

Mr. Morris: The question is whether or not you were at that time when you were investigated in another investigation, and I would like to know whether or not you were at that time a member of the Communist Party.

Mr. Slochower: I understand the question and I would like to answer in my own way.

Chances are that Senator Ferguson and the others are acquainted with a famous novel called "The Trial."

[fol. 145] Senator Ferguson: Has that anything to do with your answer?

Mr. Slochower: It has a lot.

In that novel there is a character who is accused by somebody of something he did not know what it was, and for the rest of his life is investigated and re-investigated until the end, when they starved him to death. I was asked in 1940 or 1941—I have forgotten the date—this question which you are asking me again.

Since 1940, twelve years, this question has been asked again and again—by the Rapp-Coodert, by the Board and Faculty and so on, and I have had twelve years of the utmost difficulty of living, in trying to live down the accusation that was made.

Senator Ferguson: Have you ever answered that question?

Mr. Slochower: Yes, I did answer it.

Senator Ferguson: Go ahead and answer it now.

Mr. Slochower: I want you to understand the difficulty of facing the prospect of answering this question for the rest of your life. Is it original sin? Once somebody has accused you, you are guilty for the rest of your life?

Mr. Morris: What is your answer?

Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question. Were you at the time you are referring to, when you state some charge was made against you, were you at that time a member of the Communist Party?

Mr. Slochower: I hope that the time is coming when the higher courts are going to declare that a question of this [fol. 146] sort is in violation of those traditions of America which I have learned to cherish.

I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this question is not proper. I should like to protest on that basis of the First Amendment.

Senator Ferguson: I cannot recognize the First Amendment, as a lawyer and a member of the United States Senate. I cannot allow you to invoke that as a reason.

Mr. Slochower: There is a possibility that the high courts might reverse you.

Senator Ferguson: I do not believe they will or I would rule otherwise.

Mr. Slochower: The other thing is that I am hoping also that the time may come when it will be declared that this Federal body has no jurisdiction in a matter which concerns a city or state educational system. This is another ground on which I should like to protest against the question.

Senator Ferguson: I will deny that ground.

Mr. Slochower: O.K., sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or '41. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer.

Mr. Morris: Do you know any professor or any teacher on the Brooklyn faculty who was at some time a member of the Communist Party?

Mr. Slochower: Mr. Morris, as I told you in executive hearing, I am willing to answer all questions pertaining to this nature which cover roughly the past ten to twelve years. Beyond that—well, I would say I would always answer your questions about my birth and confirmation and things like that, but beyond the twelve years, questions of this type, I am forced to refuse.

Senator Ferguson: In other words there is a certain period that you refuse to answer about, under the Fifth Amendment?

Mr. Slochower: Yes, sir.

Mr. Slochower: You see, as soon as you bring up the dates, I have to—

Senator Ferguson: He has to invoke the Fifth Amendment back of that time, he indicates to the committee.

Mr. Morris: Mr. Chairman, May I raise one point, as a legal matter?

If we go back ten and twelve years, I wonder what statute of limitations runs that long and what kind of crime would be outlawed by it?

Senator Ferguson: The difficulty is that there are some crimes that are not barred by the Statute of Limitations, such as absence from the country extending the period; also [fol. 148] the fact that something there could connect a person with a crime now. And in all rulings here I want to use the Constitution in its broadest sense, and I just feel that, and think that this man is conscientiously claiming this on the ground that it might tend to incriminate him.

Mr. Slochower: I have very good reasons for doing it, but I cannot tell the reasons. The reasons are very good, and it has to do not with implying anything about guilt, Senator—nothing at all.

Senator Ferguson: So I just merely give him the benefit of the doubt, and do not require him to answer.

Mr. Morris: I don't mean that, Professor. I mean, have you ever been known over a long period of time by a name other than your own name?

Mr. Slochower: In the Old Country, my mother used to call me Hirschel. First it was Anglicized to this country to Hirsch, and then Harry, and when people want to compliment me, they call me Henry.

Mr. Morris: You know the ordinary implications of the question:

Have you ever been known by an alias?

Mr. Slochower: You are referring to political things?

Senator Ferguson: Did you write under another name?

Mr. Slochower: Again, if it is a question with regard to the past ten to twelve years—

Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.

[fols. 149-174] Mr. Slochower: That is, whether I was known under any other name. Again for very good reasons, which do not imply guilt.

Henrietta Friedman on October 13, 1952

Mr. Morris: Mrs. Friedman, have you ever been a member of the Communist Party?

Mrs. Friedman: Mr. Chairman, I must decline to answer this for the reasons that I have already given.

Mr. Morris: Is one of the reasons the fact that your answer will incriminate you?

Mr. Morris: The question was were you ever a member of the Communist Party.

Mrs. Friedman: I said I must decline to answer that for reasons I have already given.

Mr. Morris: Is one of the reasons that your answer may incriminate you?

Mrs. Friedman: I gave you several other reasons.

Mr. Morris: Is that one of your reasons?

Mrs. Friedman: Yes, that is one of my reasons.

Mr. Morris: Are you presently a member of the Communist Party?

Mrs. Friedman: I must decline to answer that.

Senator Smith: For the same reason?

Mrs. Friedman: For all of the reasons I have given you.

Mr. Morris: Have you been a leader in a forum in the Communist Party Club?

Mrs. Friedman: Mr. Chairman, I must decline to answer that for all of the reasons that I have given you.

[fol. 175]

EXHIBIT A TO ANSWER

Testimony of Harry Slochower, 221 East 18th Street, Brooklyn 26, New York. Accompanied by his Attorney, Royal W. France.

Senator Ferguson: Raise your right hand, Doctor.

You do solemnly swear in the matter now pending before this subcommittee of the Judiciary Committee of the United States Senate, that you will tell the truth, the whole truth, and nothing but the truth, so help you God.

Mr. Slochower: I do, sir.

[fol. 176] Mr. Morris: Will you give your full name and address to the reporter please?

Mr. Slochower: My name is Harry Slochower, S-l-o-c-h-o-w-e-r, and I live at 221 East 18th Street, Brooklyn 26, New York.

Mr. Morris: What do you do, Mr. Slochower?

Mr. Slochower: You mean: What is my occupation?

Mr. Morris: What is your occupation?

Mr. Slochower: I teach and write and lecture.

Mr. Morris: What do you teach?

Mr. Slochower: I am officially in the Department of German, but it so happens that various developments within the college, that most of my courses are in comparative literature, and world literature.

Mr. Morris: Are you a full professor?

Mr. Slochower: I was hoping to become one next year, but what this will do to that chance, I don't know. As a matter of fact, yesterday morning I was asked to hand in some data on my contributions to publications. That was

yesterday morning. They didn't know about the subpoena and I didn't tell them because I was hoping that they wouldn't know. The very fact of the hearings, the very mention of the name in this type of thing—you are aware of it, Senator—is enough to indict one. You have only to be accused, then you are guilty. First comes the verdict and then comes the trial.

Senator Ferguson: That has been a very fine speech on your part. In other words, you are criticizing this committee for trying to look into the question of the internal security of the United States of America?

Mr. Slochower: No, sir.

[fol. 177] Senator Ferguson: Let us proceed along the line of getting the facts.

Mr. Slochower: No, sir; I am not. May I say something about your allegation?

Senator Ferguson: I, of course, heard what you had to say, and now you may start the examination.

Mr. Morris: Were you mentioned in the 1940-1941 hearings, or identified in the hearings of the New York Legislative Committee, as a Communist?

Mr. Slochower: I wasn't present there when the testimony was given, but I was told that one of my colleagues by the name of Bernard Grebanier had mentioned the fact that I was, had been or was a member of the Communist Party.

Mr. Morris: Were you called in as a witness in that inquiry?

Mr. Slochower: You mean before the Rapp-Condert? Oh, yes—twice. Once it was a meeting with—well, yes; there was an investigation. It was a private hearing, though. It never became public.

Mr. Morris: Were you at that time a member of the Communist Party?

Mr. Slochower: Well now, Mr. Morris, if you allow me to answer this question fully, I will have to begin with a literary allusion.

Mr. Morris: Well, it calls for a Yes or No answer, unless you want to invoke some kind of privilege.

Mr. Slochower: This is a very serious matter and I think you ought to allow me a little leeway. I beg your indulgence.

Senator Ferguson: I might ask this: Are you going to answer the question?

[fol. 178] Mr. Slochower: I am going to answer, in my way.

Senator Ferguson: That is what I mean. You are going to answer the question?

Mr. Slochower: I am going to answer in my way; yes. I am going to communicate to you with respect to the question which you put.

Senator Ferguson: As to whether or not you ever were a Communist?

Mr. Morris: The question is whether or not you were at that time when you were investigated in another investigation; and I would like to know whether or not you were at that time a member of the Communist Party.

Mr. Slochower: I understand the question, and I would like to answer in my own way.

Chances are that Senator Ferguson and the others are acquainted with a famous novel called "The Trial".

Senator Ferguson: Has that anything to do with your answer?

Mr. Slochower: It has a lot.

In that novel there is a character, who is accused by somebody of something he did not know what it was, and for the rest of his life is investigated and reinvestigated until the end, when they starved him to death. I was asked in 1940 or 1941—I have forgotten the date—this question which you are asking me again.

Since 1940, twelve years, this question has been asked again and again—by the Rapp-Coudert, by the Board of Faculty and so on, and I have had twelve years of the utmost difficulty of living, in trying to live down the accusation that was made.

[fol. 179] Senator Ferguson: Have you ever answered that question?

Mr. Slochower: Yes, I did answer it.

Senator Ferguson: Go ahead and answer it now.

Mr. Slochower: I want you to understand the difficulty of facing the prospect of answering this question for the rest of your life. Is it original sin? Once somebody has accused you, you are guilty for the rest of your life?

Mr. Morris: What is your answer?

Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question: Were you at the time you are referring to, when you state some charge was made against you—were you at that time a member of the Communist Party?

Mr. Slochower: I hope that the time is coming when the higher courts are going to declare that a question of this sort is in violation of those traditions of America which I have learned to cherish.

I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this question is not proper. I should like to protest on that basis of the First Amendment.

Senator Ferguson: I cannot recognize the First Amendment, as a lawyer and a member of the United States Senate. I cannot allow you to invoke that as a reason.

Mr. Slochower: There is a possibility that the high courts might reverse you.

[fol. 180] Senator Ferguson: I do not believe they will or I would rule otherwise.

Mr. Slochower: The other thing is that I am hoping also that the time may come when it will be declared that this Federal body has no jurisdiction in a matter which concerns a city or state educational system. This is another ground on which I should like to protest against the question.

Senator Ferguson: I will deny that ground.

Mr. Slochower: O. K., sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or '41. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer.

Mr. Morris: In 1950, Professor Slochower, did you sign

a letter addressed to President Truman urging freedom for the leaders of the Joint Anti Fascist Refugee Committee?

Mr. Slochower: Yes, sir; I did.

Mr. Morris: That was reported in the Daily Worker of August 22, 1950, page 2.

Mr. Slochower: You would know that, but I didn't because I don't read the Daily Worker.

Mr. Morris: You do recall it?

Mr. Slochower: Yes; I wrote the letter. I can tell you what I wrote in it.

[fol. 181] Mr. Morris: Could you tell us?

Mr. Slochower: I was concerned with one member of the committee, Professor Bradley.

Mr. Morris: Professor Lyman R. Bradley?

Mr. Slochower: Yes, whom I knew personally, and who was a professor of German. My field was originally German, and we had many, many conversations about culture, and I found him to be a completely decent human being. I don't know anybody more so than Professor Bradley. It was out of a personal feeling that this man was put in jail and loses his job. Another person can go in another city and change his name or something, but this is an investment in which you lose it and you lose everything.

I felt so strongly about this friend of mine that I took this step, unprecedented in my case—I am not a political person. This was a personal appeal on behalf of Dick Bradley.

Senator Ferguson: Did you know at that time whether or not he was a Communist?

Mr. Slochower: How could I?

Senator Ferguson: I am asking you.

Mr. Slochower: You are implying that I have a basis of information.

Senator Ferguson: I asked you whether you did.

Mr. Slochower: No.

Mr. Morris: Do you know of ~~any~~ individual now living who was in the past a member of the Communist Party?

Mr. Slochower: Living or dead?

Mr. Morris: Any man now living. Do you know now any individual now living who was in the past a member of the Communist Party?

[fol. 182] Mr. Slochower: I am sure Joe Stalin is a member.

Mr. Morris: Do you know any professor or any teacher on the Brooklyn faculty who was at some time a member of the Communist Party?

Mr. Slochower: Mr. Morris, as I told you in executive hearing, I am willing to answer all questions pertaining to this nature which cover roughly the past ten to twelve years. Beyond that—well, I would say *I would say* I would always answer your questions about my birth and confirmation and things like that, but beyond the twelve years, questions of this type, I am forced to refuse.

Senator Ferguson: In other words there is a certain period that you refuse to answer about, under the Fifth Amendment?

Mr. Slochower: Yes, sir.

Senator Ferguson: And outside of that period you are perfectly willing to answer the questions?

Mr. Slochower: Anything you want, sir.

Senator Ferguson: I understand that.

Mr. Morris: Professor Slochower, have you done anything in the last ten or twelve years which would indicate, in your opinion, opposition to the Communist organization?

Mr. Slochower: You see, Mr. Morris—I should address myself to you.

Senator Ferguson: That is perfectly all right.

Mr. Slochower: My field is not politics. My field is philosophy, literature, art, and now it is the Myth. Now, within that field, by implication one might say I am for or against—but the difficulty of the question is this: So far as I know, there is no Communist doctrine which is dogmatic—as far as I know.

[fol. 183] Mr. Morris: You know the question refers to the Communist organization, not the Communist theory.

Mr. Slochower: The Communist Party—that I have done anything against it?

Mr. Morris: Yes.

Mr. Slochower: What chance would I have?

Mr. Morris: I am asking if you have.

Mr. Slochower: I would have to join a political party of some kind. I don't know how that is possible.

I could tell you this: that within my field I have expressed myself in many ways which directly and by implication accounted to some doctrines held by many Communists.

Senator Ferguson: I did not quite get that.

Mr. Slochower: I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions; let us say literature and philosophy, opposed to positions held by many Communists. I say "many" because there is no dogma as far as I know, on philosophy.

Senator Ferguson: Do you think there is freedom of thought in philosophy?

Mr. Slochower: You mean in the Soviet Union? You mean in our sense?

Senator Ferguson: Yes.

Mr. Slochower: I will tell you.

Senator Ferguson: I wish you would.

Mr. Slochower: The thing has to be viewed historically. Russia and the whole East has never known economic, social, political and intellectual freedom. They never had an American Revolution and never a French Revolution. [fol. 184] Absence of a middle class prevented all of those wonderful things.

Senator Ferguson: They lacked the idea of freedom of religion and freedom of thought and assembly?

Mr. Slochower: It is conceivable to me why most of the Russian people might accept certain lines, because they don't miss them. So freedom of thought in our sense certainly cannot be present anywhere in the East and I don't even mean Russia—China, or Greece or Turkey or Africa, any of those countries which never had a French Revolution or an American Revolution, with all the ideals of *laissez faire*. We have had them and we had to fight for them to keep them and not fall into the very trap that we think we are being led by them.

Mr. Morris: Professor Slochower, have you ever advocated that violence is justified?

Mr. Slochower: I am a man of peace. I am praying for peace. I have a little daughter.

Mr. Morris: Do you remember writing a book review, "Prospects of American Democracy," by George Counts, and this book review appeared in the New York Teacher in 1939?

Mr. Slochower: I recall that the review was published.

I hardly recognized the review, but I remember having written one.

Senator Ferguson: You claimed it is not a proper quote?

Mr. Slochower: I don't know what the quote is.

Mr. Morris: You say, "It must be admitted that the problem of means and ends in its theoretical formulation pre- [fol. 185] sents something like an irresolvable enmity. Democracy is used at times in the sense of its ultimate form, i. e. a classless order; at other times, it stands for relative democracy as it exists under class-rule. But, in his advocacy of means, Counts neglects to differentiate between the two kinds of democracies. The point seems to be that in class society, where democracy is relative, methods too must be relative."

If means are viewed in context, as means-end, Fascism in which violence is an end, cannot be lumped with Communism, where it is intended at worst, as a transitory weapon."

Mr. Slochower: I recognize that somewhat—not the formulation, you see.

Mr. Morris: There you say with respect to communism, "violence is intended, at worst, as a transitory weapon."

Senator Ferguson: What did you mean by that?

Mr. Slochower: I had reference to the famous theoretical position of one of the Marxist writers, what they call the Dictation of the Proletariat, is a transitory phase.

Senator Ferguson: In other words, you must have the Dictatorship as a means of going over into communism?

Mr. Slochower: That isn't precisely the point that they make. I think the point they make is that it may be necessary to have what they called "Dictatorship of the Proletariat".

Senator Ferguson: That is what Russia claims she has now—the Dictatorship, prior to transferring over to pure Communism?

Mr. Slochower: I think so, although some of them make [fol. 186] more ambitious claims, that they have gone already into the stage of socialism and not already advanced into the stage of communism. I am not sure of this. I was here formulating the philosophy and not the practice.

By the way, this "means to an end"—did I use quotations? That isn't my phrase. It is John Dewey's, and I

here make public acknowledgments to John Dewey that this is his phrase and not mine.

Mr. Morris: That hyphenated word, you meant, not the whole paragraph?

Mr. Slochower: In one part of his development he held that position, and I was a student of his.

Mr. Morris: Have you ever written for the *New Masses*?

Mr. Slochower: Yes.

Mr. Morris: When did you write for *New Masses*?

Mr. Slochower: It is long ago, but I think it was primarily during the time of Hitler, during the '30's when, to my mind *New Masses* was identical with anti Hitler. So was *Science and Society*.

Mr. Morris: Are you now a member of the Teachers Union?

Mr. Slochower: Yes, I am.

Mr. Morris: Have you any reason to believe that any Communists exist now and have existed in the past in the Teachers Union?

Mr. Slochower: I may be praised for this or damned, but my contacts in the Teachers Union have been so tenuous that the only thing I know is I send my dues in and then I get the news letter, and I see the kind of things which they do, which [fol. 187] I think are worth while—and that is why I belong.

Senator Ferguson: Do you ever see anything that they do in that news letter that is not worthwhile?

Mr. Slochower: I don't recall offhand. What I am concerned with about the Teachers' Union first is it is an organization in which the officers, and so on are elected by ballot, and I always got the ballot.

Senator Ferguson: Well, did you know Bella Dodd?

Mr. Slochower: Very slightly.

Senator Ferguson: Did you know that she told how they did it by ballot, but the Communists rigged it?

Mr. Slochower: Bella Dodd, I understand, is now in a personal state of mind where maybe she is seeing visions.

Mr. Morris: Who told you that?

Mr. Slochower: That is a literary term.

Senator Ferguson: Suppose she is telling the truth?

Mr. Slochower: Suppose she is.

Senator Ferguson: Do you think she might be?

Mr. Slochower: I have no way of knowing.

Senator Ferguson: Have you any evidence to show that she was wrong when she told, in effect, that she rigged the elections and rigged the passing of resolutions?

Mr. Slochower: Senator Ferguson, as a lawyer and former Judge, you know it is impossible, logically, ever to prove the negative, somebody said.

[fol. 188] Senator Ferguson: You indicated that she was seeing visions.

Mr. Slochower: Well, it is possible. She has had a very, very difficult time.

Senator Ferguson: I wondered whether you wanted it to stand as your answer.

Mr. Slochower: With regard to this, no. My point is you can never prove a negative.

Senator Ferguson: And you do not know whether or not they did rig the elections?

Mr. Slochower: Certainly not, but to prove what they didn't do—"When did you stop beating your wife?" You cannot prove a negative, legally, and I think it is recognized as such.

Mr. Morris: Professor, the question is: While you were in the Teachers Union, did you ever encounter any evidence of present-day or past Communist activity?

Mr. Slochower: As I said, my contacts have been so limited, because of my interest in writing and so on, and so forth, that I do not recall anything which suggests that.

Mr. Morris:

Mr. Morris: Even when you were in Local 537?

Mr. Slochower: What was that?

Mr. Morris: The Teachers Union Local, when it was a separate local.

Mr. Slochower: When was that?

Mr. Morris: Certainly it existed in that form in 1940 and 1941.

Mr. Slochower: You see, as soon as you bring up the dates, I have to —

Senator Ferguson: He has to invoke the Fifth Amendment back of that time, he indicates to the committee.

Mr. Morris: Mr. Chairman, may I raise one point, as a legal matter?

[fol. 189] If we go back ten and twelve years, I wonder

what statute of limitations runs that long and what kind of crime would be outlawed by it?

Senator Ferguson: The difficulty is that there are some crimes that are not barred by the Statute of Limitations, such as absence from the country extending the period; also the fact that something there could connect a person with a crime now. And in all rulings here I want to use the Constitution in its broadest sense, and I just feel that, and think that this man is conscientiously claiming this on the ground that it might tend to incriminate him.

Mr. Slochower: I have very good reasons for doing it, but I cannot tell the reasons. The reasons are very good, and it has to do not with implying anything about guilt, Senator—nothing at all.

Senator Ferguson: So I just merely give him the benefit of the doubt, and do not require him to answer.

Mr. Morris: Have you ever used an alias, a name other than your own?

Mr. Slochower: That sounds like an embarrassing question. You mean—well, when I went somewhere with somebody or what?

Mr. Morris: I don't mean that, Professor. I mean have you ever been known over a long period of time by a name other than your own name?

Mr. Slochower: In the Old Country, my mother used to call me Hirschel. First it was Anglocized to this country to Hirsch, and then Harry, and when people want to compliment me, they call me Henry.

[fols. 190-212] Mr. Morris: You know the ordinary implications of the question:

Have you even been known by an alias?

Mr. Slochower: You are referring to political things.

Senator Ferguson: Did you write under another name?

Mr. Slochower: Again, if it is a question with regard to the past ten to twelve years—

Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.

Mr. Slochower: That is, whether I was known under any other name? Again for very good reasons, which do not imply guilt.

Mr. Morris: Mr. Chairman, may this whole book review be introduced into the record?

Senator Ferguson: Yes.

(The book review referred to was received for the record.)

Mr. Morris: That is all. The next witness will be Professor Gene Weltfish.

Senator Ferguson: Mr. Morris, it is about five minutes to five. I do not know that we can finish this witness. I think we ought to go over to 9:00 in the morning.

Mr. Morris: Mr. Chairman, may we have the open session at 10:00, and continue the practice of having our executive session at 9:00?

Senator Ferguson: The executive sessions will be at 9:00 and the open session at 10:00 in the morning. You will all come back at 10:00 o'clock.

The committee will rise until 9:00 o'clock tomorrow morning.

Mr. Morris: Will the witnesses in open session who have not been heard be here at 9:00 o'clock tomorrow morning?

[fol. 213] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

OPINION IN BOTH PROCEEDINGS

By Mrs. Justice F. E. Johnson

(N. Y. L. J., Dec. 8, 1952, p. 1415; col. 5.)

Danman v. Board of Education of City of N. Y.; Shlakman v. Board of Higher Education of City of N. Y. — In these two proceedings under Article 78, some of the petitioners were dismissed by the Board of Higher Education and the others by the Board of Education of the City of New York, but the grounds upon which all the dismissals took place are so similar that the proceedings have been heard together, and should be decided together.

There is very little, if any, dispute of fact, and the differences of opinion are almost altogether on the law; they arise partly because of the difference of view as to the

status that these teachers had in relation to the City of New York. Generally speaking, the petitioners deny that they had such a relationship or status as made applicable to them Section 903 of the City Charter, under which the respondents here claimed power to act. They decided that the section was self-operating, and that the refusal of these petitioners to answer the questions asked them effectuated their dismissals, at least in substance, by reason of the language of that section.

One or more duly designated members of the Senate of the United States held a hearing on the general subject of subversive influences; each of these petitioners appeared upon demand and all were confronted with various questions (which are not relevant here) in addition to the one or two questions that are relevant, namely, their relation to the [fol. 214] Communist Party or to Communism. The phrasing of the questions on these subjects is not criticized, nor can there be any doubt about their meaning; there is no suggestion that the slightest confusion did, or could, exist among any of the petitioners as to what they were being asked, or the meaning of the questions. In substance, the whole issue or problem here arises out of the questions concerning the present or past membership of these petitioners in the Communist Party. There were other similar, or related, questions that need not be detailed.

The world events that have been common knowledge for years past require this court to take judicial notice that the Party, which is really the group of fourteen men who, by armed might, hold the disarmed Russians in their grasp — is not only preaching the destruction of non-Communist governments, but by espionage, sabotage, oppression and murder are, and have been, busily and successfully undermining the freedom of other disarmed nations that are now in a state of hopeless captivity to that small group. Their agent, the New York Communist Party, is continuously following the program here; their success among certain Americans, who have sold out their own government, is too well known to be further dwelt upon.

The 1949 Legislature declared the *policy of the State* (chap. 369) as to Communist Party members, its teachers, when it said: "The legislature further finds and declares

that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as [fol. 215] the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced."

Mr. Marshall, while a Board of Education member, said in 1951: "The evidence before us is clear that Communist Party members have a loyalty to Soviet Russia and to the promotion of world Communism which is a higher loyalty than loyalty to their own country; that class hatred and the destruction of the bourgeois state are part of Communist doctrine; that the seizure of power in the interest of creating a so-called dictatorship of the proletariat is implicit in Communist Party membership; and that Party members engaged in education have the special task of using education for these purposes. The record shows this."

In his concurring opinion in the 1951 Dennis case (34 U.S. 494), Justice Jackson, of the Supreme Court of the United States, said: "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations or professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion."

[fol. 216] Our Court of Appeals has said that it is slanderous to call anyone a Communist because of the low reputation which that so-called ideology is held; it is not yet a *crime* to call anyone a Communist. There have been many impressive adjudications, too well known to be cited here, that the Communist Party is, and has been, committed to the program of changing all other governments by force and that in this country a part of its program is the destruc-

tion, by force, of the government under which we live; nowhere, however, is it claimed or has it been claimed that *membership* in the Communist Party is a *crime*.

Petitioners did not, however, merely refuse to answer since that might have been coönunciatory, so they gave the lawyer-like answer that undoubtedly was formulated for them by the counsel who either represented them, or most of them, on various occasions and who, as was not contradicted upon the argument hereof, gave active legal help in the formulation of some of their oral answers.

Those answers, in substance, were similar in that they all said that they would not say yes or no because the answer might tend to *incriminate* them; most of them specified the particular amendment of the Federal Constitution relied upon but, in substance, they said they would not reply lest they *incriminate* themselves. Their answers, as the minutes show, were that they were in danger of self-incrimination if they answered; they refused to admit anything, refused to make any answer that, as some said, might be used against them; in effect, and almost in form, refused to testify, as some said, against themselves.

[fol. 217] It is not claimed here that any particular answer given by any one of them had any other meaning than the foregoing; the issue was met squarely, upon the argument here by their counsel, who did not seek in any way to evade the plain significance of what they were saying, but who took the position that they could not be *required* to answer such questions.

That argument is a combination of (1) a plea of the Federal Amendment and (2) a denial that the question was allowably asked because of the alleged inapplicability of the questions to these petitioners, since they claimed to be not within section 903.

After an exhaustive argument upon these positions the court was not able to learn what *crime* it was that they feared to expose themselves to prosecution for or what possible plausibility there was to the claim that answering might *incriminate* them.

That vain attempt to learn, upon the argument hereof, how it could reasonably or with intellectual honesty be said that one who was asked that question could sensibly say

that answering it might *incriminate* him, leaves the question still unanswered.

It is a fair inference, if there is any need to draw one, that they appeared before the committee well aware of why they were there, and all prepared to give a similar answer when each was asked that main question; there is also no reasonable doubt about what did happen on those hearings, namely, that they were asked in straight-forward language that very question and no one of them would answer:

[fol. 218] It may not be important to now consider the fact, that the reason given to the Senate Committee was not intellectually honest because there is no such thing as a *criminal consequence* to the giving the answer; or that the entire plea was an "escape-method" based upon the completely fallacious suggestion that saying "yes" to the question would *incriminate* them. If, therefore, as it seems now, the question called for an answer that *could not possibly incriminate* them, and to plead the amendment was merely a subterfuge since it was completely inapplicable, this situation may have some relation to the conduct of the respondents. Article 78 brings up in this court of limited jurisdiction the question of the dismissals having been *arbitrary and capricious* (Matter of Humphrey, 298 N. Y. 327). Article 78 is like the writ of *certiorari*, and the review that is provided recognizes that the body or officer so reviewed has made a decision "which involves an exercise of judgment or discretion." It brings up whether the respondents, if exercising even quasi-judicial functions, have acted in *excess of jurisdiction* (but had jurisdiction of the subject-matter) and whether their authority has been used in the manner required by law, or has been so used as to violate the rights of the petitioners to their prejudice and whether any competent proof of the facts existed, &c.

The apparently complete inapplicability of this plea of non-incrimination seems relevant on the question of the natural and proper reaction of the respondent officers to the specious reason thus given to the Senate Committee; also because, as a matter of mere common sense, it throws [fol. 219] upon these teachers of the youth of the city the seemingly well-founded implication or accusation that their

attitude at that inquiry was not intellectually honest; that they successfully evaded the question on the unsound plea that they were in danger of *criminal* proceedings if they answered, although it is obvious that they could not be in the slightest danger of any proceedings of a *criminal* nature.

The inquiry of the Senate Committee was not irrelevant to the duties of the petitioners who had a special position towards the youth of the city; it is undeniable that children of school age are much more susceptible than adults to wrong suggestions, and if these petitioners had any notions that the average citizen considers wrong, the danger that might exist of their more or less deliberately poisoning the minds of the children would be very real. If the Communist Party is the enemy of this form of government, and is dedicated to its destruction, and they *are* or *were* members of it, it is common sense to believe that they too must be deemed to be committed to that destruction. If they were members, and sincere in their membership in a party committed to the destruction of our Constitution, it is ironical, when they are asked about that, to plead that very Constitution. The fact is that they were, by indirection, accused by the question of being *themselves* now, or in the past, committed to the overthrow of both the Constitution and the government based upon it. That charge they would not admit or deny; they evaded it by this intellectually false plea of supposed right to protection against imaginary [fol. 220] *criminal* prosecution under that smokescreen they were allowed to escape a direct answer.

Where does that leave them, from the standpoint of any intelligent parent whose child is to be inclosed in a classroom with them day by day? There are opportunities for, apparently, casual remarks and destructive comments, which are not only unlimited, but cannot be disproven or undone. If they belonged to a society for the establishment of robbery and murder (and, therefore, presumably themselves committed to a policy of theft and death) no sane person would want them to even approach his child. The destruction of this government will require wholesale bloodshed, so it seems amazing that any American citizen would be willing to join a party committed to its destruc-

tion, yet when asked a question based upon the (incredible) tacit assumption that they, by reason of such suggested membership, would seem to be committed to such wholesale bloodshedding and destruction, what kind of people are they, who will not answer? They apparently insist on holding on to the *opportunity* to influence those who are too young to withstand the poison that might be dropped into their minds.

Therefore, when the question was asked each of them, their jobs were threatened; they had a dilemma facing them; if they admitted membership the special *duty* that they had towards the young, and the special *opportunities* they had with the young, and their practically unsupervised *contact* with children, would undoubtedly cause an uprising among parents, and perhaps cost them their jobs. They dared not answer "Yes." But since there was no public [fol. 221] registration of them, if they *were* members, and no place were they obliged to *swear* that they were members, how easily could they, if they really were members, have falsely and safely answered in the negative? That easy escape from the dilemma would be (if they *were* members) to *falsely* say they were *not* members, *thereby shutting the mouths of those implied (but could not prove) they were members.*

They did not take that escape position; they were under oath before the committee; if they *falsely* said they were *not* members (when in fact they knew they were members) they might *possibly* be prosecuted for perjury if the party record was at hand.

What did they do, facing this dilemma? Their thought can have been: "If I *lie* about the *proper* answer to that question I will be guilty of perjury; I ought not to be asked to *tell a falsehood* which might render me subject to that *criminal* prosecution; therefore I plead the 5th Amendment."

They were *not* asked to *tell a falsehood*, presumably were asked only for the *truth*, and there is nothing in these papers, or on the argument, which suggests that they *thought* they were being asked to *lie* about the answer. If they were members, a truthful answer could not possibly do them any *criminal* law harm, although it might have cost

them their jobs. If they were not, then, or ever, members, why not say so?

Is there, therefore, any possible understanding of their position except that (1) if they answered truthfully that they were members, they would lose their jobs; if they [fol. 222] answered *falsely*, they might face prosecution for perjury? If that were the choice that faced them, the plea of the statute was not intellectually honest; their plea was founded upon the false *assumption* that they were being asked to falsify the answer and to say *falsely* that they were *not* members, whereupon, because of the *falsehood* under oath, they might be liable to perjury prosecution.

However, the entire purpose of the Amendment, and the only sensible meaning of it, is that no one shall be compelled to *tell the truth about himself* if it will do him criminal harm or be used against him *criminally*. That it may degrade him (as petitioners failed to claim) is not raised here. The only ground given was that they refused to *incriminate* themselves by telling the *truth*—when there could be no *crime* in so doing.

The respondents, upon the foregoing situation, surely were not guilty of arbitrary or capricious conduct when they decided that these petitioners were either intellectually dishonest or were, in fact, members of the party and so committed to everything that would be involved in a party attempt to destroy by force the government existing here and the Constitution upon which it was based.

Section 903 governs employees of both respondent bodies, not only because of the dual nature of each, but because there have been judicial decisions that so hold, in principle. Education is not, as claimed, said by the Constitution to be solely a *state* function; nothing in article IX or X warrants that claim. The Legislature, acting under LGB of article IX, has ample power to delegate the local operation [fol. 223] of a school system to boards, like the respondents; that will have dual aspects and be both city and state agencies. No proof is given here that the city does not spend part of its own taxes for school buildings, &c.; it is also common knowledge that the members of both boards are appointed by the mayor. The title of each board indicates it is part of the city government, at least to a degree.

When the officials of these boards, whose duty it is to safeguard the children from being debauched mentally and morally, find that their teachers are putting on this false show of indignation over being exposed, as apparent enemies of the nation, and are falsely claiming to be immune to the questions that go to the roots of their honesty and loyalty, and that when questioned they will not say yes or no to whether they belong to a group generally regarded as godless, disloyal, destructive and dishonest, are they arbitrary and capricious in dismissing them? Indeed, would not their retention of petitioners be grossly arbitrary and childishly capricious? Is not the cleansing of the city's school system of such foulness and danger one of the "affairs of the City" mentioned in section 903, which the respondent boards are in duty bound to attend to? The section makes the refusal to answer immediately effective, vacating the position each holds as soon as he or she has refused; they cannot (despite the dishonesty of their plea of the amendment) be compelled to answer; but the Legislature provided that *refusal* at once costs each his or her position. These respondents merely had to later carry out the formalities; the Legislature made the petitioners their own executioners.

The petitions are dismissed.

[fols. 224-231] WAIVER OF CERTIFICATION (Omitted in Printing)

[fol. 232] SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS IN BEHALF OF PETITIONER SLOCHOWER—July 27, 1953

Sirs:

Please take notice that the Petitioner Harry Slochower hereby appeals to the Court of Appeals of the State of New York from an order in the above entitled proceedings entered in the office of the Clerk of the Appellate Division of

the Supreme Court of the State of New York, in and for the Second Judicial Department, on the 15th day of June, [fol.233] 1953, filed in the office of the Clerk of the County of Kings on July 7, 1953, and served upon the undersigned as attorneys for the Petitioner Harry Slochower, on July 13, 1953. The said order, from which Petitioner appeals, affirmed an order of the Supreme Court, Kings County, entered in the above proceedings, denying Petitioner's application for an order pursuant to Article 78 of the Civil Practice Act and dismissing the petition of the said Petitioner. Two Justices of the said Appellate Division of the Supreme Court of the State of New York dissented and voted to reverse the order of the Supreme Court, Kings County.

Please take further notice that the Petitioner Harry Slochower appeals from each and every part of the aforesaid order of the Appellate Division of the Supreme Court, and from the whole thereof.

Dated, New York, July 27, 1953.

Yours, etc., London, Simpson & London, Attorneys
for Petitioner, Harry Slochower, Office & P. O. Ad-
dress, 150 Broadway, New York 38, N. Y.

[fol.234] To: Clerk of the County of Kings, Hall of
Records, Brooklyn 1, N. Y.; Witt & Cammer, Esqs., Attor-
neys for Petitioners other than Harry Slochower, 9 West
40th Street, New York, N. Y.; Denis M. Hurley, Esq., Cor-
poration Counsel, Attorney for Respondent, Municipal
Building, New York 7, N. Y.

[fol. 235] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

APPELLATE DIVISION ORDER OF AFFIRMANCE, APPEALED FROM
(SHLAKMAN; PROCEEDING, ALL PETITIONERS) — JUNE 15,
1953

Present: Hon. Gerald Nolan, Presiding Justice; Hon. Frank F. Adel, Hon. Henry G. Wenzel, Jr., Hon. Frederick G. Schmidt, Hon. George J. Beldock, Justices

[fol. 236] The above named Vera Shlakman, Bernard F. Riess, Harry Slochower, Sarah R. Riedman, Henrietta A. Friedman and Melba Phillips, petitioners in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 12th day of December, 1952, denying their application to annul a resolution, dated October 6, 1952, of respondent Board of Higher Education terminating the employment of three of the petitioners, and a similar resolution, dated November 17, 1952, terminating the employment of the remaining three petitioners, all pursuant to section 903 of the New York City Charter, herein, and the said appeal having been argued by Mr. Ephraim London of Counsel for appellant Harry Slochower, and argued by Mr. Paxton Blair of Counsel for appellants other than Harry Slochower, and argued by Mr. Michael A. Castaldi, First Assistant Corporation Counsel, of Counsel for respondent, and submitted by Messers. Robert M. Benjamin and Frank E. Karselsen of Counsel for Public Education Association, as amici curiae, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:—

It is Ordered that the order so appealed from be and the same hereby is affirmed, without costs. Adel, Schmidt and Beldock, J.J., concur; Nolan, P. J., and Wenzel, J., dissent and vote to reverse the order and to grant the application, with memorandum as contained in opinion and decision slip dated June 15th, 1953.

Enter

John J. Callahan, Clerk.

[fol. 237] SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND JUDICIAL DEPARTMENT

MEMORANDUM OPINION OF APPELLATE DIVISION (DANEMAN
PROCEEDING), 282 App. Div. 717

Appeal in an article 78 proceeding by eight petitioners (teachers in elementary, junior high and high schools of the City of New York) from an order denying their application to annul a resolution, dated October 2, 1952, of respondent Board of Education terminating the employment of six of the petitioners, and a similar resolution, dated October 23, 1952, terminating the employment of the remaining two petitioners, all pursuant to section 903 of the New York City Charter. Order affirmed, without costs (see Matter of Shlakman v. Board of Higher Education of the City of N. Y. (282 App. Div. 718), decided herewith. Adel, Schmidt and Beldock, J.J., concur. Nolan, P. J., and Wenzel, J., dissent and vote to reverse the order and to grant the application for the reasons set forth in their dissenting memorandum in Matter of Shlakman v. Board of Higher Education of the City of N. Y. (282 App. Div. 718).

MEMORANDUM OPINION OF APPELLATE DIVISION (SHLAKMAN
PROCEEDING), 282 App. Div. 718

Appeal by six petitioners (two associate professors, three assistant professors, and one instructor, in three municipal colleges) from an order denying their application to annul a resolution, dated October 6, 1952, of respondent Board of Higher Education terminating the employment of three of the petitioners, and a similar resolution, dated [fol. 238] November 17, 1952, terminating the employment of the remaining three petitioners, all pursuant to section 903 of the New York City Charter.

Order affirmed, without costs.

In our opinion, petitioners are employees of the city within the meaning of section 903 of the New York City Charter (Matter of Withrow v. Joint Legislative Comm'n, etc., 176 Misc., 597; Matter of Goldway v. Board of Higher

Education, 178 Misc. 1023; *Matter of Koral v. Board of Education of City of N. Y.*, 197 Misc. 221). The charter section is applicable to a hearing before a legislative committee of the federal government, even though that committee is not authorized to conduct an inquiry regarding the property, government or affairs of the city, or regarding the official conduct of an employee of the city (*Matter of Koral v. Board of Education of City of N. Y.* [supra]). An inquiry into present or past membership in the Communist party is a question regarding the official conduct of a teacher within the meaning of the charter section. Nor is such an inquiry barred by the provisions of sections 25 and 26-a of the Civil Service Law (*Matter of Rabouine v. McNamara*, 301 N. Y., 785). The New York City Charter is not a local law within the meaning of section 2 of the City Home Rule Law, but an emergency local law adopted pursuant to the provisions of the then Article XII, section 2 (now Article IX, sec. 11) of the New York State Constitution (*Matter of Mooney v. Cohen*, 272 N. Y., 33) and, therefore, provisions of the charter may modify or amend statutes inconsistent therewith, or be supplemental thereto (*Matter of Finegan v. Cohen*, 275 N. Y., 432). The charter provision does not [fol. 239] abridge the constitutional privilege against self incrimination (*Canteline v. McClellan*, 282 N. Y., 166; *McAuliffe v. Mayor of New Bedford*, 155 Mass., 216).

Adel, Schmidt and Beldock, J.J., concur.

NOJAN, P. J., and WENZEL, J., dissent and vote to reverse the order and to grant the application, with the following memorandum:

We are in accord with the majority view that section 903 of the New York City Charter is applicable to a hearing before a federal legislative committee, and that an inquiry into present or past membership in the Communist party is an inquiry regarding official conduct of a city officer or employee. We also agree that the charter is not a local law within the meaning of the provisions of the State Constitution and the City Home Rule Law in effect when the charter was adopted, which prohibited cities from adopting local laws which superseded a state statute, if such local laws applied to or affected the maintenance, support or ad-

ministration of the educational system in such cities. We are at variance, however, with the conclusion of the majority that section 902 of the charter authorizes the summary termination of appellants' employment, and that appellants are employees of the city within the meaning of that section. Section 903 has application only to a "councilman or other officer or employee of the city". Appellants are not councilmen, and unless they are city officers or employees, their employment may be terminated only as provided in the Education Law of the State of New York. They are not officers of the city (*Matter of Gelson v. Berry*, [fol. 240] 233 App. Div., 20; *Steinson v. Board of Education of N. Y.*, 165 N. Y., 431; *Munnally v. Board of Education of the City of New York*, 46 Misc. 477). Neither are they employees of the city. They are employed by the respondent board, which like the Board of Education of the City of New York, is a corporation created by the state, entire separate and apart from the City of New York, in so far as the administration of the educational system of the city is concerned (Education Law, secs. 2551, 6202; *People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y., 125; *Lewis v. Board of Education of City of N. Y.*, 258 N. Y. 117). In the administration of the educational system, such boards are not departments of the city government (*Matter of Divisich v. Marshall*, 281 N. Y. 170), nor do they act as the agents of the city (*Titusville Iron Co. v. City of N. Y.*, 207 N. Y. 203; *People ex rel. Wells & Newton Co. v. Craig*, supra; *Gunnison v. Board of Education*, 176 N. Y., 11). Teachers employed in New York City contract with the Board of Education or the Board of Higher Education, and not with the city (*Gunnison v. Board of Education*, supra). The city does not hire them, nor may it prescribe their duties, or qualifications, or fix their salaries. In fact none of the usual characteristics of the relation of employer and employee exist, as between the city and teachers employed in the city schools.

It is apparently the majority view that it was the intention of the Charter Revision Commission to make section 903 of the charter all inclusive, so as to include within the provisions of that section all employees and officers in any way connected with the administration of the affairs of the

City of New York. We are unable to agree with that view. [fol. 241 242] We are dealing with language employed, not by laymen, but by a commission whose membership included able and distinguished lawyers, who were unquestionably familiar with the many pronouncements of the courts of the state to the effect that boards of education in cities were corporations separate and apart from the cities in which they existed, and who had no difficulty in stating, in plain language, when they wished to do so, the provisions of the charter which were to be applied to the boards of education and the public schools (see Chap. 20, New York City Charter). Such boards are not without power to deal with subversive activities in the schools under the provisions of the Education Law, and under other provisions of the charter (Education Law, secs. 2573, 6206; Charter, sec. 526). It is our opinion, however, that section 903 of the charter which provides for forfeiture of office or employment without notice or hearing, and which does not expressly include appellants within its terms should not be enlarged by implication or intendment beyond the fair meaning of the language used, to include persons other than those clearly described therein. The order appealed from should be reversed and the application should be granted.

[fol. 243] Triple Certificate to foregoing paper omitted in printing.

[fol. 244] In Court of Appeals of New York

In the Matter of Mary L. Dandman et al., Appellants, against
Board of Education of the City of New York, Respondent.

In the Matter of Vera Shlakman et al., Appellants, against
Board of Higher Education of the City of New York,
Respondent.

Orsini. Decided April 22, 1954

Conway, J. Petitioners who are teachers - the first group in public schools, the second group in public colleges - were subpoenaed and appeared in September and October of 1952

before Senator Homer Ferguson, sitting in New York as a subcommittee of the Committee on the Judiciary of the Senate of the United States to investigate the administration of the Internal Security Act and other internal security laws.

Among other questions each of the petitioners was asked whether he or she was presently or had ever been a member of the Communist party. Each of them refused to answer, basing the refusal upon the privilege against self incrimination granted by the Fifth Amendment to the United States Constitution.

The board of education and the board of higher education received certified copies of the transcript of the minutes of the hearing. Each of these boards was advised by the corporation counsel of the City of New York that the refusal to answer questions on the only ground which was sustained, viz., the privilege granted by the Fifth Amendment, constituted a refusal to answer the respective questions on the ground that the answer would tend to incriminate within the meaning of section 903 of the New York City Charter and that questions directed to employees of the boards [fol. 245] concerning past or present membership in the Communist party constituted an inquiry into the employees' official conduct within the purview of the same section. Thereupon, the boards adopted resolutions terminating the employment of petitioners and declaring their positions vacant pursuant to the provisions of section 903. There is no claim by petitioners that their refusal to answer the questions based upon the privilege granted them by the Fifth Amendment does not constitute a refusal to answer upon the ground that the answer would tend to incriminate them within the meaning of Charter section 903, but only that the section, for various reasons to be discussed, is not applicable.

In this proceeding we are required to and do accept as truthful petitioners' assertion that answers to the questions propounded might have tended to incriminate them since that is the only reason that persons questioned by a congressional committee concerning their affiliation with the Communist party are entitled to invoke the protection of the Fifth Amendment to the United States Constitution (see

Blau v. United States, 340 U.S. 159). Similarly, we do not presume, of course, that these petitioners by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.

Section 903 reads: "If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regard the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." (Emphasis supplied.)

Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone [fol. 246] possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral v. Board of Educ. of City of N. Y.*, 197 Misc. 221). As the Supreme Court said in *Adler v. Board of Educ.* (342 U.S. 485, 492, affg. *sub nom. Thompson v. Wallin*, 301 N. Y. 476): "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited:] They may work for the school system upon the

reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." And, many years ago Justice Holmes in *McAuliffe v. New Bedford* (155 Mass. 216, 220) said similarly: "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein. (See, e.g., Greater New York Charter, § 1549; now New York City Charter, § 895; *Matter of Hulbert v. Craig*, 124 Misc. 273, aff'd, 213 App. Div. 865, aff'd, 241 N. Y. 525; *Metzger v. Swift*, 231 App. Div. 598; *Metzger v. Swift*, 258 N. Y. 440; Public Officers Law, § 30; *Matter of Buhler*, 43 Misc. 140; *Ginsberg v. City of Long Beach*, 286 N. Y. 400.) The people have similarly provided in our State Constitution as to all public officers who refuse to sign waivers of immunity under certain circumstances (art. I, § 6, and see *Cantalone v. McClellan*, 282 N. Y. 166, and cases cited therein).

There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573 and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally, by the board [fol. 247] of education and not by the city, whereas the

Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used.

Following the adoption of the resolutions of the boards terminating the employment of petitioners, they commenced these two article 78 proceedings. Special Term concluded that section 903 applied and had been violated by petitioners. The petitions were dismissed. The Appellate Division, Second Department, affirmed, two Justices dissenting. The majority held that teachers in New York City public schools and colleges are city employees within the meaning of Charter section 903; that the Charter section is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee; that such inquiry is not barred by the provisions of sections 25 and 26-a of the Civil Service Law; that the Charter is not a local law within the meaning of section 2 of the City Home Rule Law and that the Charter provisions do not abridge the constitutional privilege against self incrimination. The dissenting Justices agreed with the majority that section 903 is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee and that the Charter is not a local law within the meaning of the City Home Rule Law. They were at variance, however, with the conclusion of the majority that petitioners were employees of the City of New York within the meaning of section 903.

In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See *Communications Assn. v. Douds*, 339 U.S. 382, 425 *et seq.*; *Dennis v. United States*, 341 U.S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1.) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official

conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, § 1; Education Law, § 2002; Civil Service Law, § 12a, 30; L. 1954, ch. 253, § 1, § 8.) Communism is opposed to such loyalty. (*Communications Ass'n v. Douds*, 330 U.S. 275, 425 *et seq.*, *supra*; *Douds v. United States*, 341 U.S. 494, 564, *supra*.) Internal security [fol. 248] affects local as well as National Governments.

We are in disagreement in this court only as to two questions. They are (a) whether the Charter section is applicable to a hearing before a Federal legislative committee and (b) whether the petitioners are employees of the City of New York. All of the six Justices below were in accord in answering (a) in the affirmative.

As to (a), we, the majority, agree with all of the Justices below that section 903 is applicable to a hearing before a Federal legislative committee. The language in section 903 is: "any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry." * * * We cannot say that that language excepted a legislative committee of our National Government for we read "any" to mean "any."

As to (b), when the Legislature adopted the Charter of the City of New York and the Administrative Code it declared that it intended "to provide an administrative code for the city of New York harmonizing with the provisions of the New York city charter" (Administrative Code, § 982-1.0) and directed that the code was to be "construed liberally". (Administrative Code, § 982-2.0.) In section 983-1.0 of the Administrative Code the Legislature defined an employee as "Any person whose salary in whole or in part is paid out of the city treasury". This language cannot be misread. Petitioners are paid by check, signed by the city treasurer with funds from the city treasury.

The Education Law (§§ 2553, 6201) empowers the Mayor of the City of New York to appoint the members of the board of education and to appoint and remove the members of the board of higher education. The City Charter (§ 522) requires the board of education to submit an annual written report to the Mayor. The Education Law (§§ 2576, 6262)

requires both boards to submit to the board of estimate expense budget estimates, just as city departments do (see, also, New York City Charter, § 895); counsel for the city is their counsel (New York City Charter, § 394, subd. a; *Matter of Kay v. Board of Higher Educ. of City of N. Y.*, 260 App. Div. 9, motion for leave to appeal denied 285 N.Y. 859); the boards of education and higher education are before us asserting, not denying, the applicability of section 903 of the City Charter and section 982-1.0 of the Administrative Code to them and the petitioner teachers. We have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate matters of public education from the control of municipal government. (*Matter of Hirshfield v. Cook*, 227 N. Y. 297, 301; *Matter of Divisich v. Marshall*, 281 [fol. 249] N. Y. 170; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208; *Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11.) We have in so doing; however, been careful to point out, as already indicated, in *Matter of Hirshfield v. Cook* (*supra*) that: "If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is unmistakable" (pp. 309-310) and that: "while the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not *strictly* educational or pedagogic." (P. 304; emphasis supplied.) Thus, board of education employment must be added to other municipally paid service in determining seniority rights under section 31 of the Civil Service Law. (*Matter of Schaefer v. Rathbun*, 237 App. Div. 491, 494-495, aff'd, 232 N. Y. 492); employees of the board of education are employees of the city under section 896 of the New York City Charter making it a crime to conspire to defraud the city. (*People v. Kugel*, 200 Misc. 60); the officers of trustee

of Hunter College of the City of New York and of members of the board of higher education are offices "connected with the government of the City of New York" within the meaning of section 1549 of the Greater New York Charter (now New York City Charter, § 895) which prohibits dual office holding by city officers. (*Metzger v. Swift*, 258 N. Y., 440, *supra*; see, also, Education Law, §§ 2554, 2573, 6206; New York City Charter, § 896.)

The State has the power to determine what shall constitute a vacatur of public office or employment and, in enacting statutes, to *define* the terms used therein as in its wisdom it sees fit. Thus, it may define who are employees of the City of New York and we must accept the legislative definition as binding upon us. (*Matter of Bronson*, 150 N. Y. 1; McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], § 75; *People ex rel Champlin v. Gray*, 185 N. Y. 196, 200.) It has made the *source* of the compensation the determinant factor.

Petitioners are in reality asking us to take the words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic, on the one hand, and then rewrite the Administrative Code (§ 981-1.0) (subd. 7) so that the words "Any person whose salary in whole or in part is paid out of the city treasury" as used to define an employee of the city shall not mean that teachers are employees of the city, although their salaries are paid by check of the city [fol.250] treasurer from the city treasury. This we may not do but must take clear, simple and unambiguous words of the Legislature as we find them. (*Meltzer v. Koenigsberg*, 302 N. Y. 523, 525; *Matter of Rathscheck*, 300 N. Y. 346, 350, 353; *Matter of Tishman v. Sprague*, 293 N. Y. 42, 50.)

Finally, it is urged that at the time the Charter was approved and when it became effective in 1938 the Legislature did not have in mind the specific purpose for which section 9-3 is now being used. Whether or not that be true is doubtful indeed since the Supreme Court of the United States has upheld the deportation of legally resident aliens because of

membership in the Communist party for periods between 1925 and 1939 in *Harrisades v. Shaumburg*, 642 U. S. 586. Section 903 became effective January 1, 1968. But even if it were to be accepted as true it would be of little moment here. More than fifty years ago in *Hudson R.R. Tel. Co. v. Watertlet Turnpike & Ry. Co.* (135 N. Y. 393, 403-404), we said: "The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. * * * It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." And, only recently in *Matter of Di Brizzi (Proskauer)* (363 N. Y. 206 [1951]), this court upheld the use of a statute (Executive Law, § 62, subd. 8, now § 63, subd. 8) to permit the creation of a "New York State Crime Commission", which was originally enacted a few weeks after our entry into World War I as a "Peace and Safety Act" (L. 1917, ch. 595) for the purpose of dealing with war-time sabotage, espionage and subversive activities of enemy agents and sympathizers, and the repeal of which the Attorney General of the State had recommended to the Legislature because it was "suited to war conditions". (1918 Atty. Gen. 16.). And so, here section 903 protects the people of the city and the State's chartered municipalities from dangers encompassed by the language of the statute, even though the precise danger may not have been envisioned at the moment of passage.

The orders appealed from should be affirmed, without costs.

DESMOND, J. (dissenting):

That communism in the United States is a conspiracy against our Government, and that participation in such a conspiracy is entirely inconsistent with the loyalty required [Id. 251] from a school teacher, are undisputed propositions which do not decide this case. Our duty, on this point, as on any other, is to apply the law of this State as we find

them to communists, non-communists, and everyone else. No purpose, however high or urgent, suspends the salutary rule that statutes, directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils (see McKinney's Cons. Laws of N. Y., Book 1, Statutes, 1942 ed., pp. 95, 144, 146, and cases cited; also *Kaufman & Sons Saddlery Co. v. Miller*, 228 N. Y. 38, 44, 45, and *Matter of Trustees of New York City Fire Dept. Pension Fund*, 299 N. Y. 8, 19) (*Metropolitan Life Ins. Co. v. Durkin*, 301 N. Y. 376, 381). If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so, nor has this court hesitated to enforce them (see the "Feinberg Law", Education Law, § 3022, as construed in *Thompson v. Wallin*, 301 N. Y. 476; *Matter of Miller v. Wilson*, 282 App. Div. 418, motion for leave to appeal denied 306 N. Y. 1). Ours is the judicial task, limited by judicial powers, of interpreting and applying section 903 of the New York City Charter as enacted in 1938. We find nothing in that section's language, history or known purposes to justify using it, as it is being used here, as authority for ousting public schoolteachers, employed by respondent board of education, because of their refusals to answer questions put to them by a subcommittee of the United States Senate, appointed to investigate the administration of the Federal Internal Security Laws, as to the teachers' past or present membership in the Communist party. All sides concede that, aside from the supposed applicability of section 903, the teachers could not be deprived of their positions, for exercising their Fifth Amendment right (see *Matter of Grace*, 282 N. Y. 428, 433). We turn then to the Charter provision, and we find it clear, concise and complete: "§ 903.

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination,

election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify (fol. 252) upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

Section 903 is inapplicable to these appellants in this situation for at least two separate reasons: first, no appellant is an "employee of the city" within the meaning of the law; and, second, the United States Senate group whose questions appellants refused to answer was not authorized to conduct an inquiry into the property, affairs and government of the city or the official conduct of its officers and employees.

First, as to whether these teachers are "employees of the city", section 1 of article XI of our State Constitution makes public education a State function, and the policy of this State for a century "has been to separate public education from all other municipal functions and intrust it to independent corporate agencies" such as boards of education (*Gannison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11, 23). "The board of education is a corporation separate and distinct from the city of New York" (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208). Matters of appointment of teachers and permanency of their employment have been, by the State Education Law, taken away from the municipalities and given to the education boards (*Matter of Emerson v. Buck*, 230 N. Y. 380, 385). The grants of authority to the boards to administer public education within New York City are exclusive, and negative any authority in the city itself to exercise like powers (*People, ex rel. Wells & Norton Co. v. Crain*, 232 N. Y. 125, 135). The long struggle between the Buffalo board of education and the City of Buffalo described in *Matter of Emerson v. Buck* (*supra*), was ended by this court's declaration thirty years ago, in *Matter of Fuhrmann v. Graves* (235 N. Y. 77, 82, 83), that, while the city controls the total amount

to be expended for education, it has no control whatever over the manner of its spending (see, also, *Matter of Brennan v. Board of Educ. of City of N. Y.*, 245 N. Y. 8, 14). There followed an impressive train of cases holding that public schoolteachers, in the cities of the State, were employees, not of those cities but of the local boards of education as separate corporate bodies (*Matter of Gelson v. Berry*, 233 App. Div. 20, 21, aff'd, 257 N. Y. 551; *Matter of Ragsdale v. Board of Educ. of City of N. Y.*, 282 N. Y. 323, 325; *Nelson v. Board of Higher Educ. of City of N. Y.*, 623 App. Div. 144, 148, aff'd, 288 N. Y. 649).

It is, therefore, indisputable: not only that the State Constitution and judicially declared State policy bar New York City from the role of "employer" of teachers, but [fol. 253] also, that, as between the City of New York and these teachers, there are none of the marks of an employer-employee relationship, since it is not the city, but the separate boards of education, which select and hire the teachers, pay them, control their teaching work, and are empowered to remove them for cause after hearing (see Education Law, § 2, subd. 14; and §§ 2550, 2551, 2573, 3012, 3022, 6206). Statutes and decisions (cited in great numbers in respondent's brief) relating to other than pedagogical matters or pedagogical personnel have nothing to do with the present problem. The question here is as to whether teachers are "employees of the city". Actually, the only ground suggested for an affirmative answer to that question is the definition in section 981-1.0 of the New York City Administrative Code (a statute separate from, but complementary to, the Charter) of "employee" as "any person whose salary in whole or in part is paid out of the city treasury." The salaries of teachers are "paid out of the city treasury" from funds there on deposit to the credit of the board of education, but we refuse to believe that this sixteen word definition, in a general statute not concerned with education, destroys the whole public policy of this State, worked out in more than a century of struggle, of seeing to it that public schoolteachers are definitely not employees of the cities of this State. Until now, there has never been a decision of this court holding any teacher to be an "employee" of a city.

A second, and separate, reason why section 903 has no application to this situation is that this Senate subcommittee was not authorized to, and disclaimed any purpose to, conduct an inquiry into New York City's governmental affairs or the "official conduct" of any "employee" of the city or of the board of education. It may be possible, grammatically, to read the statute's language: "any legislative committee . . . authorized to conduct any hearing or inquiry" as unrelated to the later phrases in the same sentence: "regarding the property, government or affairs of the city . . . or regarding the . . . official conduct of any officer or employee of the city". But that grammatical possibility is a logical impossibility, and the result would be a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers, about his official conduct. We do not so construe statutes, especially since we know historically (and as respondents themselves tell us) that section 903 was one of the by-products of the "Seabury Investigation" of 1932. It is most unlikely that the New York State Legislative Committee, of which Judge Seabury was counsel, or the Legislature itself in setting up the Charter Revision Commission in 1934, or the [fol. 254-255] commission in its 1936 recommendation of a new charter for New York City, or the Legislature or the people of the city in voting for it, intended to deal with a situation where a foreign legislative body might question New York City employees about New York City's governmental affairs. What section 903 contemplates is an inquiry by a New York State, or New York City, legislative committee or officer or board or body authorized to investigate the city government. This subcommittee of the United States Senate was not and did not on this occasion claim to be such a committee, officer, board or body.

What section 903 means is that a city officer or employee must answer the question of a qualified investigating body concerning the city's affairs, or concerning the conduct of city business by the questioned city officer or employee, or by any other city officer or employee, or forfeit his employment. When, in 1949, the Legislature determined (see findings attached to L. 1949, ch. 360) that the Communist party

had been infiltrating into public employment in the public schools, it passed the appropriate (Feinberg) Act to deal with that situation (Education Law, § 3022). But the 1938 City Charter of New York dealt with something else entirely, that is, with facilitating local and State investigations of New York City affairs. Membership of teacher in the Communist party may, under the Feinberg law, prove the teacher's unfitness to be a teacher, and Feinberg Law procedures should be used to bring about any removal for that cause. Refusal of a teacher in a properly authorized investigation, to co-operate by answering questions as to membership in subversive organizations may justify dismissal after hearing, under sections 2573 or 6206 of the Education Law, and those procedures are available and lawful.

In each case, the order should be reversed and the petition granted, with costs in all courts.

LEWIS, CH. J., FROESSEL and VAN VORHIS, JJ., concur with CONWAY, J., DESMOND, J., dissents in opinion in which DYE and FULD, JJ., concur.

Orders affirmed.

[fol. 256] IN COURT OF APPEALS OF NEW YORK

No. 390

In the Matter of the Application of MARY I. DANIMAN and
ors., Appellants, for an Order etc.,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Re-
spondent, Annulling the Dismissal of Petitioners, etc.
And another proceeding (Shlakman)

REMITTITUR—April 22, 1954

Be it remembered, That on the 20th day of October, in the
year of our Lord one thousand nine hundred and fifty-three
Mary I. Daniman and ors., the appellants in these causes
came here unto the Court of Appeals, by Harold I. Cammer

and ors., their attorneys, and filed in the said Court Notice of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Board of Education of the City of New York, the respondent in said causes, afterwards appeared in said Court of Appeals by Denis M. Hurley, its attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard these causes argued by Mr. Paxton Blair, of counsel for all the appellants except Harry Slochower, and by Mr. Ephraim London, of counsel for the appellant Harry Slochower, and by Mr. Michael A. Castaldi, of counsel for the respondents, and a brief having been filed on behalf of the amicus curiae, and after due deliberation had thereon did order and adjudge that the orders of the Appellate Division of [fol. 257] the Supreme Court appealed from herein be and the same hereby are affirmed, without costs.

And it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be affirmed, without costs, as aforesaid.

And hereupon, as well as the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(S.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 258] IN COURT OF APPEALS OF NEW YORK

Present, Hon. Edmund H. Lewis, Chief Judge, Presiding.
Mo. No. 253

In the Matter of the Application of MARY I. DANIMON and
ors., Appellants,
for an Order, etc.,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, etc.,
RESPONDENT

Annulling the Dismissal of Petitioners, etc., and another
proceeding (Shlakman).

MEMORANDUM OPINION—July 14, 1954

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the petitioners-appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is denied except as to petitioner-appellant Slochower, on the ground that no question under the Federal Constitution was [fol. 259] presented by them to the Court of Appeals. Motion by petitioner-appellant Slochower granted to the extent indicated. Return of remittitur requested and when returned it will be amended by adding thereto the following:

Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter section 903, in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled;

(2) that the ~~congressional~~ sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct; and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment.

And the Supreme Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

/s/ GEORGE KIMBALL, *Deputy Clerk.*

[fol. 260] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of VERA SHILAKMAN,
Bernard E. Reiss, Harry Slochower, Sarah R. Riedman,
Henrietta A. Freidman and Melba Phillips, Appellants

— against —

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED
STATES

1. Notice is hereby given that Harry Slochower, one of the abovenamed Appellants, hereby appeals to the Supreme Court of the United States from the final decree of the Court of Appeals of the State of New York affirming the dismissal of Appellant's petition for an order directing the Appellee to restore Appellant to his position as Associ-

ate Professor at Brooklyn College. The final decree of the Court of Appeals of the State of New York was entered in this proceeding on July 14, 1954.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

II. The Clerk of the Supreme Court of the State of New York, County of Kings, will please prepare a transcript of the record in this cause, and include in said transcript the following:

[fol. 261] The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York.

The Remittitur from the Court of Appeals, as amended pursuant to the order of the Court of Appeals dated July 14, 1954.

III. The following questions are presented by this appeal:

1. Whether Section 903 of the New York City Charter contravenes the Fifth Amendment to the Constitution of the United States in that it imposes as a condition to public employment, the surrender of the Federal Constitutional right to refuse to be a witness against one's self.

2. Whether Section 903 of the New York City Charter, pursuant to which Appellant Harry Slochower was discharged without notice or hearing from employment as an Associate Professor of Brooklyn College, and was disqualified from future employment by the City of New York or any of its agencies, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States. The relevant provisions of Section 903 of the New York City Charter provide for termination of employment by New York City of any employee who refuses, when interrogated by any legislative committee, to answer any question relating to the affairs of the City on the ground that his answer may tend to incriminate him.

3. Whether Section 903 of the New York City Charter, as interpreted in this case, contravenes Article I, Section 10, of the Constitution of the United States and the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it imposes the penalty of discharge from employment

[fol. 262] for an act brought retroactively within the purview of the section, and which Appellant could not have known, was within the purview of the section. Section 903 of the New York City Charter was made applicable to this case by virtue of provisions incorporated in a statute after Appellant's discharge.

4. Whether Appellant Harry Slochower was deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, the said Appellant having been discharged without notice or hearing from a position to which he had a statutory and contractual right, for refusing, when interrogated by a sub-committee of the United States Senate, to state whether he had been a member of the Communist Political Association in 1940 and 1941, on the ground that the answer might tend to incriminate him.

Dated, New York, October 5th, 1954.

Ephraim S. London, Attorney for Appellant, Harry Slochower, Office & P. O. Address, 150 Broadway New York 38, N. Y.

To: Hon. Adrian P. Burke, Corporation Counsel of the City of New York, Municipal Building, New York 7, N. Y.
Hon. Francis J. Sinnott, Clerk of the Supreme Court of the State of New York, County of Kings.

Clerk's Certificate to foregoing paper omitted in printing

[fols. 263-265] *Proof of Service* (omitted in printing).

[fol. 266] SUPREME COURT OF THE UNITED STATES, 200 OTHER
TERM, 1954

No. 466

HARRY SICHOWER, Appellant

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK
ORDER NOTING PROBABLE JURISDICTION—February 7, 1955

Appeal from the Court of Appeals of the State of New
York.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdic-
tion is noted.

(2467-9)

SUPREME

Supreme Court of the United States

OCTOBER TERM, 1954.

No. ~~106~~ 23

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

EPHRAIM S. LONDON,

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150 Broadway,

New York 38, N. Y.

LEONARD P. SIMPSON, Esq.,

SHERMAN P. KIMBALL, Esq.,

Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1954.

No. _____

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

(a) Reports of the Opinions in the courts below.

This case was instituted by petition to the Supreme Court of the State of New York, Kings County. The petition was dismissed, and the opinion of the court is reported in 202 Misc. 915, 118 N. Y. Supp. 2d, 487.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the order dismissing the petition, and the Appellate Division (two of the five justices dissenting) affirmed the order dismissing the petition. The opinions of the Appellate Division are reported in 382 App. Div. 717, 718, 122 N. Y. Supp. 2d, 286, 905.

An appeal from the order of affirmance was taken to the Court of Appeals of the State of New York. The Court of Appeals (three of seven Judges dissenting) affirmed the order of the Appellate Division. The opinions of the Court of Appeals are reported in 306 N. Y. 532, 119 N. E. 2d 373.

A motion for amendment of the remittitur or in the alternative, for leave to reargue, was made to the Court of Appeals of the State of New York. Leave to reargue was denied, and the motion of the Appellant Slochower to amend the remittitur was granted. The opinion of the Court of Appeals denying leave to reargue and amending the remittitur with respect to the Appellant Slochower, is reported in 307 N. Y. 806, 121 N. E. 2d 629.

(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is invoked.

(i) The proceeding was instituted to review and annul the Appellee's order or directive discharging appellant and terminating his employment as Associate Professor at Brooklyn College. The Appellant was discharged without notice or hearing because of his refusal, when questioned on September 25, 1952, by a sub-committee of the Committee on the Judiciary of the United States Senate, to state whether he had been a member of the Communist Party in 1940 and 1941. Appellant refused to answer the question on the ground that his answer might tend to incriminate him.

The proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York, relating to causes in the nature of mandamus and certiorari proceedings.

(ii) The decree sought to be reviewed was made by the Court of Appeals of the State of New York on April 22, 1954, and was entered April 23, 1954. An order of the Court of Appeals denying leave to reargue was made July

14, 1954. The Notice of Appeal to the Supreme Court of the United States was filed October 5, 1954, in the Supreme Court of the State of New York, Kings County.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *McCullum v. Board of Education*, 333 U. S. 203 (1948); *Wieman v. Updegraff*, 344 U. S. 183 (1952); *Adams v. Maryland*, 347 U. S. 179 (1954).

(v) The validity of Section 903 of the New York City Charter is involved. The text of the statute follows:

NEW YORK CITY CHARTER, §903

Failure to testify

§903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

The section may be found in The New York City Charter and The Administrative Code of The City of New York, p: 137 (Williams Press, 1943).

(c) The Questions presented by the Appeal.

(1) Whether §903 of the New York City Charter, in providing for discharge from employment and ineligibility for future employment of any New York City employee who refuses to testify against himself in a Federal proceeding, abridges an immunity of citizens of the United States, in violation of the Fourteenth Amendment.

(2) Whether §903 of the New York City Charter, in providing for discharge from employment and ineligibility for future employment by the City of New York, of any employee who invokes the Fifth Amendment right to refuse to incriminate himself, contravenes the due process clause of the Fourteenth Amendment.

(3) Whether §903 of the New York City Charter, is an *ex post facto* Law.

(d) The Material Facts of the Case.

The Appellant, Harry Slochower, was an Associate Professor of Literature and of German at Brooklyn College, one of the colleges of the New York City public school system. The college is governed by the Appellee, the Board of Higher Education of the City of New York.

On September 24, 1952, Appellant appeared pursuant to subpoena and testified before a sub-committee of the U. S. Senate Committee on the Judiciary. When asked whether he had been a member of the Communist Party eleven or twelve years before the inquiry, in 1940 or 1941, he declined to answer on the ground that his answer might tend to incriminate him. However, Appellant did state

that he had not been a member of the Communist Party after 1941, and that he had publicly expressed opinions in opposition to communist doctrine.

On October 6th, the Appellant was summarily dismissed from his position as a college professor. He was dismissed pursuant to Section 903, without notice or hearing, though he had been a college teacher for twenty-seven years and had tenure under New York Education Law §6206. The only reason given for Appellant's discharge was that he had refused to answer the questions referred to on the ground of self-incrimination. It was not claimed that Appellant had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for the Appellant is widely known as a scholar, lecturer, author and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

The following federal questions sought to be reviewed were raised in Appellant's petition by which the proceedings were initiated:

(1) Whether the action taken by the Appellee, pursuant to §903 of the New York City Charter, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (fols. 58, 127*).

(2) Whether the action taken by the Appellee pursuant to Section 903 deprived Appellant of rights, and of the equal protection of the laws, guaranteed by the Fourteenth Amendment to the United States Constitution (fols. 58, 127).

The Federal questions sought to be reviewed were also raised in the Appellant's arguments and briefs in the

*Folio references are to the numbered folios of the papers on appeal to the Court of Appeals of the State of New York.

Appellate Division and the Court of Appeals of the State of New York.

The courts passed upon the questions raised by upholding the validity of the statutes. The Court of Appeals of the State of New York, in its supplemental opinion made the following references to the Federal questions raised by Appellant:

"Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter (§903), in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional subcommittee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct, and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a 'subversive' organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment" (307 N. Y. 806-807).

The majority opinion in the Appellate Division of the State of New York made the following reference to the Federal question:

The charter provision does not abridge the constitutional privilege against self-incrimination (*Canteline v. McClellan*, 282 N. Y. 166; *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216) (fols. 714-715).

(e) The Federal Questions are Substantial.

(1) *The Statute Abridges an Immunity of Citizens of the United States.*

The law under consideration, as construed by the highest court of the state, provides for the discharge of any city employee who exercises the right to refuse to testify against himself in a Federal proceeding. It provides further that any person exercising the Federal Constitutional right shall not be eligible for further employment by the city or its agencies.

The Fourteenth Amendment to the Constitution prohibits any state from abridging the privileges and immunities of citizens of the United States. The right to refuse, when interrogated by a United States Senate Committee, to answer self-incriminating questions, is guaranteed by the Fifth Amendment to the Constitution. *Adams v. Maryland*, 347 U. S. 179 (1954). A law requiring one who exercises that right to surrender his means of livelihood is an abridgment, if not a denial, of the right.

The precise question here presented has not been passed upon by this court. In *Adamson v. California*, 332 U. S. 46 (1947) and in *Twining v. New Jersey*, 211 U. S. 78 (1908) this Court distinguished between the right of a citizen of a state, to refuse to testify against himself in a state proceeding, and the right of a citizen of the United States to refuse to incriminate himself in a Federal proceeding. It was held in the *Adamson* and *Twining* cases that the Constitution did not protect the former right against state invasion. The right to refuse to incriminate one's self in a Federal

proceeding, however, may not be limited by state action. *Adams v. Maryland*, 347 U. S. 179 (1954); and it is with that right that we are here concerned. See also *Rochin v. California*, 342 U. S. 165, 174, 177 (1952) (concurring opinions).

(2) *The Enforcement of the Statute Violated the Due Process Clause of the Fourteenth Amendment.*

Whether a public servant has a right to employment by a government agency, or whether such employment is considered a privilege, the right or privilege may not be arbitrarily withheld or terminated. The arbitrary exclusion of a civil servant from state employment contravenes the due process clause of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183 (1952).

The statutory requirement that one surrender a Federal Constitutional right, as a condition to employment by the government, or as a condition to the enjoyment of a privilege conferred by the state, is an arbitrary assertion of power and a denial of due process. *Fröst v. R. R. Com.*, 271 U. S. 583, 593 (1926); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d, 992, 997 (1940); *Matter of Peck v. Cargill*, 167 N. Y. 391, 395 (1901).

In *Orloff v. Willoughby*, 345 U. S. 83 (1953) this Court held that one who refused to testify against himself could not complain if, for that reason, he was thereafter denied an army commission to which he had no claim. The Court stated, however, that no one may be punished for asserting the constitutional right (345 U. S. 83, 91, 97).

Section 903 imposes a punishment for exercising the constitutional right, for discharge and permanent disqualification from public employment is a punishment of "a most severe type." *United States v. Bovett*, 328 U. S. 303, at p. 316 (1946); *Cummings v. Missouri*, 4 Wall. 277 (1866).

(3) *The Statute Under Consideration Violates Article I Section 10 of the Constitution.*

In *United States v. Lovett*, 328 U. S. 303, 316 (1946), this Court held:

"No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a State or by the United States." 328 U. S. 303, 316. (Emphasis supplied.)

The statute here challenged accomplished the very result condemned in the *Lovett* case, *supra*. Section 903 of the New York City Charter provides for the dismissal of a city employee who refuses to answer questions relating to his "official conduct." The political affiliation, and certainly past affiliation, of an employee has no connection with his official duties or conduct. The duties and tenure of New York civil service employees may not be affected or influenced by their political opinions or affiliations. New York Civil Service Law §25; *People ex rel. Garvey v. Prendergast*, 148 App. Div. 129, 133. In fact it is a penal offense for a superior to inquire into the political connection of an employee in the civil service. New York Civil Service Law §26a.

The court below held membership in the Communist Party a matter relating to Appellant's "official conduct"

because the Communist Party had been found to be a conspiracy against the government "and loyalty to our government goes to the very heart of official conduct" (306 N. Y. 532, 540-541). But the questions put to the Appellant did not relate to the party held to be a disloyal conspiracy. The questions that Appellant refused to answer related to membership in 1940 and 1941. As the indictment charged in *United States v. Dennis*, 341 U. S. 494 (1951), the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. It was determined in the *Dennis* case, *supra*, that the purpose and aim of the *new* party, and not its predecessor, was the destruction of the government by violence (341 U. S. at p. 517).

The court below also found past membership in the Communist Party a matter relating to "official conduct" and therefore within the comprehension of Section 903, because of the provisions of New York Education Law §3022 (the Feinberg Law) (306 N. Y. 532, 540-541). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means. By its terms no group is affected by the Feinberg Law until the group is determined to be subversive by the Board of Regents, Education Law §3022(2).

It was not until September 24, 1953, that the Board of Regents determined the Communist Party to be a "subversive" organization within the meaning of the Feinberg Law and §12-a of the Civil Service Law (New York Times, September 25, 1953, p. 1). The determination, effective the date of its announcement, was made one year after the

Appellant was questioned, and more than eleven months after he was dismissed.

Thus Appellant was dismissed pursuant to Section 903, and "sentenced to perpetual exclusion" from employment by the City and its agencies, for an act brought within the definition of the statute eleven months after his dismissal.

December 2, 1954.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS

In the Matter of MARY I. DASIMAN *et al.*, Appellants,
against BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Respondent.

In the Matter of VERA SHLAKMAN *et al.*, Appellants,
against BOARD OF HIGHER EDUCATION OF THE CITY OF
NEW YORK, Respondent.

APPEAL, in each of the above-entitled proceedings, from orders of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1953, which affirmed, by a divided court, orders of the Supreme Court at Special Term (F. E. JOHNSON, J.), entered in Kings County, denying an application under article 7A of the Civil Practice Act for an order directing respondent, constituting the board of education of the City of New York in the first proceeding, and the board of higher education of the City of New York in the second proceeding, to annul the dismissal of petitioners from their positions as teachers and to reinstate them without prejudice.

CONWAY, J. Petitioners who are teachers—the first group in public schools, the second group in public colleges—were subpoenaed and appeared in September and October of 1952 before Senator Homer Ferguson, sitting in New York as a subcommittee of the Committee on the Judiciary of the Senate of the United States to investigate the administration of the Internal Security Act¹ and other internal security laws.

Among other questions each of the petitioners was asked whether he or she was presently or had ever been a member of the Communist party. Each of them refused to answer, basing the refusal upon the privilege against self incrimination granted by the Fifth Amendment to the United States Constitution.

¹ See 8 U. S. C. A., §1182.

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The board of education and the board of higher education received certified copies of the transcript of the minutes of the hearing. Each of these boards was advised by the corporation counsel of the City of New York that the refusal to answer questions on the only ground which was sustained, viz., the privilege granted by the Fifth Amendment, constituted a refusal to answer the respective questions on the ground that the answer would tend to incriminate within the meaning of section 903 of the New York City Charter and that questions directed to employees of the boards concerning past or present membership in the Communist party constituted an inquiry into the employees' official conduct within the purview of the same section. Thereupon, the boards adopted resolutions terminating the employment of petitioners and declaring their positions vacant pursuant to the provisions of section 903. There is no claim by petitioners that their refusal to answer the questions based upon the privilege granted them by the Fifth Amendment does not constitute a refusal to answer upon the ground that the answer would tend to incriminate them within the meaning of Charter section 903, but only that the section, for various reasons to be discussed, is not applicable.

In this proceeding we are required to and do accept as truthful petitioners' assertion that answers to the questions propounded might have tended to incriminate them since that is the only reason that persons questioned by a congressional committee concerning their affiliation with the Communist party are entitled to invoke the protection of the Fifth Amendment to the United States Constitution (see *Blau v. United States*, 340 U. S. 159). Similarly, we do not presume, of course, that these petitioners by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.

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Section 903 reads: "If any councilman or other officer or *employee* of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, *any legislative committee*, or *any* officer, board or body authorized to conduct *any* hearing or inquiry, or *having appeared* shall refuse to testify or to *answer any question* regarding the property, government or affairs of the city or of any county included within its territorial limits, *or regarding* the nomination, election, appointment or *official conduct* of any officer or *employee* of the city or of any such county, *on the ground that his answer would tend to incriminate him*, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." (Emphasis supplied.)

Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self-incrimination is equivalent to a resignation (*Matter of Koral v. Board of Educ. of City of N. Y.*, 197 Misc. 221). As the Supreme Court said in *Adler v. Board of Educ.* (342 U. S. 485, 492, affg. *sub nom. Thompson v. Wallin*, 301 N. Y. 476): "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities

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of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." And, many years ago Justice HOLMES in *McAuliffe v. New Bedford* (155 Mass. 216, 220) said similarly: "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein. (See, e.g., Greater New York Charter, §1549, now New York City Charter, §895; *Matter of Hulbert v. Craig*, 124 Misc. 273, affd. 213 App. Div. 865, affd. 241 N. Y. 525; *Melzer v. Swift*, 231 App. Div. 598, affd. 258 N. Y. 440; Public Officers Law, §30; *Matter of Buhler*, 43 Misc. 140; *Ginsberg v. City of Long Beach*, 286 N. Y. 400.) The people have similarly provided in our State Constitution as to all public officers who refuse to sign waivers of immunity under certain circumstances (Art. 1, §6, and see *Cantelino v. McClellan*, 282 N. Y. 166, and cases cited therein).

There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573

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and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally by the board of education and not by the city, whereas the Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used.

Following the adoption of the resolutions of the boards terminating the employment of petitioners, they commenced these two article 78 proceedings. Special Term concluded that section 903 applied and had been violated by petitioners. The petitions were dismissed. 202 Misc. 915. The Appellate Division, Second Department, affirmed, two Justices dissenting. 282 App. Div. 717, 718. The majority held that teachers in New York City public schools and colleges are city employees within the meaning of Charter section 903; that the Charter section is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee; that such inquiry is not barred by the provisions of sections 25 and 26-a of the Civil Service Law; that the Charter is not a local law within the meaning of section 2 of the City Home Rule Law and that the Charter provisions do not abridge the constitutional privilege against self incrimination. The dissenting Justices agreed with the majority that section 903 is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee and that the Charter is not a local law within the meaning of the City Home Rule Law. They were at variance however, with the conclusion of the majority that petitioners were employees of the City of New York within the meaning of section 903.

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In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S. 382, 425 *et seq.*; *Dennis v. United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, §1).) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, §1; Education Law, §3002; Civil Service Law, §§12a, 30; L. 1951, ch. 233, §§1, 8.) Communism is opposed to such loyalty. (*Communications Assn. v. Douds*, 339 U. S. 382, 425 *et seq.*, *supra*; *Dennis v. United States*, 341 U. S. 494, 564, *supra*.) Internal security affects local as well as National Governments.

We are in disagreement in this court only as to two questions. They are (a) whether the Charter section is applicable to a hearing before a Federal legislative committee and (b) whether the petitioners are employees of the City of New York. All of the six Justices below were in accord in answering (a) in the affirmative.

As to (a), we, the majority, agree with all of the Justices below that section 903 is applicable to a hearing before a Federal legislative committee. The language in section 903 is: "*any* legislative committee, or *any* officer, board or body authorized to conduct *any* hearing or inquiry * * *." We cannot say that that language excepted a legislative committee of our National Government for we read "*any*" to mean "*any*".

As to (b), when the Legislature adopted the Charter of the City of New York and the Administrative Code it declared that it intended "to provide an administrative code for the city of New York harmonizing with the provisions of the New York city charter" (Administrative Code, §982-1.0) and directed that the code was to be "construed liberally". (Administrative Code, §982-2.0.) In

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section 981-1.0 of the Administrative Code the Legislature defined an employee as "Any person whose salary in whole or in part is paid out of the city treasury". This language cannot be misread. Petitioners are paid by check signed by the city treasurer with funds from the city treasury.

The Education Law (§§2553, 6201) empowers the Mayor of the City of New York to appoint the members of the board of education and to appoint and remove the members of the board of higher education. The City Charter (§522) requires the board of education to submit an annual written report to the Mayor. The Education Law (§§2576, 6202) requires both boards to submit to the board of estimate expense budget estimates, just as city departments do; (See, also, New York City Charter, §895); counsel for the city is their counsel (New York City Charter, §394, subd. a; *Matter of Kay v. Board of Higher Educ. of City of N. Y.*, 260 App. Div. 9, motion for leave to appeal denied 285 N. Y. 859); the boards of education and higher education are before us asserting, not denying, the applicability of section 903 of the City Charter and section 982-1.0 of the Administrative Code to them and the petitioner teachers. We have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate matters of public education from the control of municipal government. (*Matter of Hirshfield v. Cook*, 227 N. Y. 297, 301; *Matter of Divisich v. Marshall*, 281 N. Y. 170; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208; *Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11.) We have in so doing, however, been careful to point out, as already indicated, in *Matter of Hirshfield v. Cook* (*supra*) that: "If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority

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relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is 'unmistakable' " (pp. 309-310) and that: "while the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not *strictly* educational or pedagogic." (P. 304; emphasis supplied.) Thus, board of education employment must be added to other municipally paid service in determining seniority rights under section 31 of the Civil Service Law. (*Matter of Schaefer v. Rathmann*, 237 App. Div. 491, 494-495, affd. 262 N. Y. 492); employees of the board of education are employees of the city under section 896 of the New York City Charter making it a crime to conspire to defraud the city (*People v. Engel*, 200 Misc. 60); the offices of trustee of Hunter College of the City of New York and of members of the board of higher education are offices "connected with the government of the City of New York" within the meaning of section 1549 of the Greater New York Charter (now New York City Charter, §895) which prohibits dual-office holding by city officers. (*Metzger v. Swift*, 258 N. Y. 440, *supra*, see, also, Education Law, §§2554, 2573, 6206; New York City Charter, §896.)

The State has the power to determine what shall constitute a vacatur of public office or employment and, in enacting statutes, to *define* the terms used therein as in its wisdom it sees fit. Thus, it may define who are employees of the City of New York and we must accept the legislative definition as binding upon us. (*Matter of Bronson*, 150 N. Y. 1; McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §75; *People ex rel. Champlin v. Gray*, 185 N. Y. 496, 200.) It has made the *source* of the compensation the determinant factor.

Petitioners are in reality asking us to take the words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic

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and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic, on the one hand, and then rewrite the Administrative Code (§981-1.0, subd. 7) so that the words "Any person whose salary in whole or in part is paid out of the city treasury" as used to define an employee of the city shall not mean that teachers are employees of the city, although their salaries are paid by check of the city treasurer from the city treasury. This we may not do but must take clear, simple and unambiguous words of the Legislature as we find them. (*Meltzer v. Koenigsberg*, 302 N. Y. 523, 525; *Matter of Rathscheck*, 300 N. Y. 346, 350, 353; *Matter of Tishman v. Sprague*, 293 N. Y. 42, 50.)

Finally, it is urged that at the time the Charter was approved and when it became effective in 1938, the Legislature did not have in mind the specific purpose for which section 903 is now being used. Whether or not that be true is doubtful indeed since the Supreme Court of the United States has upheld the deportation of legally resident aliens because of membership in the Communist party for periods between 1925 and 1939 in *Harisiades v. Shaughnessy* (342 U. S. 580). Section 903 became effective January 1, 1938. But even if it were to be accepted as true it would be of little moment here. More than fifty years ago in *Hudson Riv. Tel. Co. v. Watervliet Turnpike & Ry. Co.* (135 N. Y. 393, 403-404), we said: "The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. . . . It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." And only recently in *Matter of Di Brizzi (Proskauer)* (303 N. Y. 206 [1951]), this court

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upheld the use of a statute (Executive Law, §62, subd. 8, now §63, subd. 8) to permit the creation of a "New York State Crime Commission", which was originally enacted a few weeks after our entry into World War I as a "Peace and Safety Act" (L. 1917, ch. 595) for the purpose of dealing with wartime sabotage, espionage and subversive activities of enemy agents and sympathizers, and the repeal of which the Attorney-General of the State had recommended to the Legislature because it was "suited to war conditions". (1918 Atty.-Gen. 16.) And so, here, section 903 protects the people of the city and the State's chartered municipalities from dangers encompassed by the language of the statute, even though the precise danger may not have been envisioned at the moment of passage.

The orders appealed from should be affirmed, without costs.

DESMOND, J. (dissenting). That communism in the United States is a conspiracy against our Government, and that participation in such a conspiracy is entirely inconsistent with the loyalty required from a school teacher, are undisputed propositions which do not decide this case. Our duty, on this appeal, as on any other, is to apply the laws of this State as we find them, to communists, noncommunists, and everyone else. No purpose, however high or urgent, suspends the salutary rule that "statutes, directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils (see McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §§95, 141, 146, and cases cited; also *Kauffman & Sons Saddlery Co. v. Miller*, 298 N. Y. 38, 44, 45, and *Matter of Breen v. New York Fire Dept. Pension Fund*, 299 N. Y. 8, 19)" (*Metropolitan Life Ins. Co. v. Durkin*, 301 N. Y. 376, 381). If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so, nor has this court hesitated to enforce them (see the "Feinberg Law",

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Education Law, §3022, as construed in *Thompson v. Wallin*, 301 N. Y. 476; *Matter of Adler v. Wilson*, 282 App. Div. 418, motion for leave to appeal denied 306 N. Y. 979). Ours is the judicial task, limited by judicial powers, of interpreting and applying section 903 of the New York City Charter as enacted in 1938. We find nothing in that section's language, history or known purposes to justify using it, as it is being used here, as authority for ousting public school teachers, employed by respondent board of education, because of their refusals to answer questions put to them by a subcommittee of the United States Senate, appointed to investigate the administration of the Federal Internal Security Laws, as to the teachers' past or present membership in the Communist party. All sides concede that, aside from the supposed applicability of section 903, the teachers could not be deprived of their positions, for exercising their Fifth Amendment right (see *Matter of Grae*, 282 N. Y. 428, 434). We turn then to the Charter provision, and we find it clear, concise and complete: "§903. * * * If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

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Section 903 is inapplicable to these appellants in this situation for at least two separate reasons: first, no appellant is an "employee of the city" within the meaning of the law; and, second, the United States Senate group whose questions appellants refused to answer was not authorized to conduct an inquiry into the property, affairs and government of the city or the official conduct of its officers and employees.

First, as to whether these teachers are "employees of the city", section 1 of article XI of our State Constitution makes public education a State function, and the policy of this State for a century "has been to separate public education from all other municipal functions and intrust it to independent corporate agencies", such as boards of education (*Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11, 23). "The board of education is a corporation separate and distinct from the city of New York" (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208). Matters of appointment of teachers and permanency of their employment have been, by the State Education Law, taken away from the municipalities and given to the education boards (*Matter of Emerson v. Buck*, 230 N. Y., 380, 385). The grants of authority to the boards to administer public education within New York City are exclusive, and negative any authority in the city itself to exercise like powers (*People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125, 135). The long struggle between the Buffalo board of education and the City of Buffalo, described in *Matter of Emerson v. Buck* (*supra*), was ended by this court's declaration thirty years ago, in *Matter of Fuhrmann v. Graves* (235 N. Y. 77, 82, 83), that, while the city controls the total amount to be expended for education, it has no control whatever over the manner of its spending (see, also, *Matter of Brennan v. Board of Educ. of City of N. Y.*, 245 N. Y. 8, 14). There followed an impressive train of cases holding that public school teachers, in the cities of the State, were employees, not of those cities but of the

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local boards of education as separate corporate bodies (*Matter of Gelson v. Berry*, 233 App. Div. 20, 21, affd. 257 N. Y. 551; *Matter of Ragsdale v. Board of Educ. of City of N. Y.*, 282 N. Y. 323, 325; *Nelson v. Board of Higher Educ. of City of N. Y.*, 263 App. Div. 144, 148, affd. 288 N. Y. 649).

It is, therefore, indisputable, not only that the State Constitution and judicially declared State policy bar New York City from the role of "employer" of teachers, but, also, that, as between the City of New York and these teachers, there are none of the marks of an employer-employee relationship, since it is not the city, but the separate boards of education, which select and hire the teachers, pay them, control their teaching work, and are empowered to remove them for cause after hearing (see Education Law, §2, subd. 14; and §§2550, 2551, 2573, 3012, 3022, 6206). Statutes and decisions (cited in great numbers in respondent's brief) relating to other than pedagogical matters or pedagogical personnel having nothing to do with the present problem. The question here is as to whether teachers are "employees of the city". Actually, the only ground suggested for an affirmative answer to that question is the definition in section 981-1.0 of the New York City Administrative Code (a statute separate from, but complementary to, the Charter) of "employee" as "any person whose salary in whole or in part is paid out of the city treasury." The salaries of teachers are "paid out of the city treasury" from funds there on deposit to the credit of the board of education, but we refuse to believe that this sixteen-word definition, in a general statute not concerned with education, destroys the whole public policy of this State, worked out in more than a century of struggle, of seeing to it that public school teachers are definitely not employees of the cities of this State. Until now, there has never been a decision of this court holding any teacher to be an "employee" of a city.

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A second, and separate, reason why section 903 has no application to this situation is that this Senate subcommittee was not authorized to, and disclaimed any purpose to, conduct an inquiry into New York City's governmental affairs or the "official conduct" of any "employee" of the city or of the board of education. It may be possible, grammatically, to read the statute's language: "any legislative committee . . . authorized to conduct any hearing or inquiry" as unrelated to the later phrases in the same sentence: "regarding the property, government or affairs of the city . . . or regarding the . . . official conduct of any officer or employee of the city". But that grammatical possibility is a logical impossibility, and the result would be a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers, about his official conduct. We do not so construe statutes, especially since we know historically (and as respondents themselves tell us) that section 903 was one of the by-products of the "Seabury Investigation" of 1932. It is most unlikely that the New York State Legislative Committee, of which Judge SEABURY was counsel, or the Legislature itself in setting up the Charter Revision Commission in 1934, or the commission in its 1936 recommendation of a new charter for New York City, or the Legislature or the people of the city in voting for it, intended to deal with a situation where a foreign legislative body might question New York City employees about New York City's governmental affairs. What section 903 contemplates is an inquiry by a New York State, or New York City, legislative committee or officer or board or body authorized to investigate the city government. This subcommittee of the United States Senate was not and did not on this occasion claim to be such a committee, officer, board or body.

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What section 903 means is that a city officer or employee must answer the question of a qualified investigating body concerning the city's affairs, or concerning the conduct of city business by the questioned city officer or employee, or by any other city officer or employee, or forfeit his employment. When, in 1949, the Legislature determined (see findings attached to L. 1949, ch. 360) that the Communist party had been infiltrating into public employment in the public schools, it passed the appropriate (Feinberg) Act to deal with that situation (Education Law, §3022). But the 1938 City Charter of New York dealt with something else entirely, that is, with facilitating local and State investigations of New York City affairs. Membership of teachers in the Communist party may, under the Feinberg Law, prove the teacher's unfitness to be a teacher, and Feinberg Law procedures should be used to bring about any removals for that cause. Refusal of a teacher in a properly authorized investigation, to co-operate by answering questions as to membership in subversive organizations may justify dismissal after hearing, under sections 2573 or 6206 of the Education Law, and those procedures are available and lawful.

In each case, the order should be reversed and the petition granted, with costs in all courts.

LEWIS, Ch. J., FROESSEL and VAN VOORHIS, JJ., concur with CONWAY, J., DESMOND, J., dissents in opinion in which DYE and FULD, JJ., concur.

Orders affirmed.

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MEMORANDUM *PER CURIAM* ON MOTION FOR
REARGUMENT OR AMENDMENT OF THE
REMITTITUR.

Motion, insofar as it seeks reargument denied. Motion, insofar as it seeks to amend remittitur, denied, except as to petitioner-appellant Slochower, on the ground that no question under the Federal Constitution was presented by them to the Court of Appeals. Motion by petitioner-appellant Slochower granted to the extent indicated. Return of remittitur requested and when returned it will be amended by adding thereto the following: Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter (§903), in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct, and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment [306 N. Y. 532].

Appendix.

ORDER APPEALED FROM.

In the Matter of the Application of MARY I. DANIMAN, & ors., Appellants; vs. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent, And another proceeding (SHLAKMAN).

BE IT REMEMBERED, that on the 20th day of October in the year of our Lord one thousand nine hundred and fifty-three, MARY I. DANIMAN, & ors., the appellants in these causes, came here unto the Court of Appeals, by Harold I. Cammer, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department, And The Board of Education of the City of New York, the respondent—in said causes, afterwards appeared in said Court of Appeals by Denis M. Hurley, its attorney,

Which said Notices of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard these causes argued by

Mr. Paxton Blair, of counsel for all the appellants except Harry Slochower, and by Mr. Ephraim London, of counsel for the appellant Harry Slochower, and by

Mr. Michael A. Castaldi, of counsel for the respondents, and a brief having been filed on behalf of the *amicus curiae*, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

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THEFORE, it is considered that the said orders be Affirmed, without costs, as aforesaid and hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(s) RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 22, 1954.

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant;

vs.

THE BOARD OF HIGHER EDUCATION, OF
THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK.

BRIEF FOR APPELLANT.

Opinions Below.

The case was instituted by petition to the Supreme Court of the State of New York, Kings County. The petition was dismissed. The opinion is reported in 202 Misc. 915, 118 N. Y. Supp. 2d, 487.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the order dismissing the petition. The Appellate Division (two of the five justices dissenting) affirmed the order dismissing the petition. The majority and dissenting opinions of the Justices of the Appellate Division are reported in 282 App. Div. 717, 718; 122 N. Y. Supp. 2d, 286, 905.

An appeal from the order of affirmance was taken to the New York State Court of Appeals. The Court of Appeals (three of seven Judges dissenting) affirmed the order of the Appellate Division. The majority and dissent-

ing opinions of the Court of Appeals are reported in 306 N. Y. 532, 545, 119 N. E. 2d 373.

A motion for amendment of the remittitur or in the alternative, for leave to reargue, was made to the Court of Appeals of the State of New York. Leave to reargue was denied, and the motion of the Appellant Slochower to amend the remittitur was granted. The opinion of the Court of Appeals denying leave to reargue and amending the remittitur with respect to the Appellant Slochower, is reported in 307 N. Y. 806, 121 N. E. 2d 629.

Statement of the Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257, Subdivision 2.

The decree sought to be reviewed was made by the Court of Appeals of the State of New York on April 22, 1954 (R. 65) and was entered April 23, 1954. An order of the Court of Appeals denying leave to reargue was made July 14, 1954 (R. 67). The Notice of Appeal to the Supreme Court of the United States was filed October 5, 1954, in the Supreme Court of the State of New York, Kings County.

Probable jurisdiction was noted February 7, 1955 (R. 71).

The Constitutional Provision and Statutes Involved.

Article I, §10:

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto

Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. p. 10.

The Constitution of the United States of America
(Government Printing Office, 1924).

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. p. 17.

The Constitution of the United States of America
(Government Printing Office, 1924).

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. p. 26.

The Constitution of the United States of America
(Government Printing Office, 1924).

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. p. 29.

The Constitution of the United States of America
(Government Printing Office, 1924).

Statutes Involved

NEW YORK CITY CHARTER, §903

Failure to testify

§903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. New York City Charter and Administrative Code (Williams Press) p. 137.

The Questions Presented for Review.

(1) Whether §903 of the New York City Charter, in providing for discharge and permanent exclusion from future public employment of any New York City employee who refuses to testify against himself in a Federal proceeding, abridges an immunity of citizens of the United States, in violation of the Fourteenth Amendment, and Article VI of the Constitution.

(2) Whether §903 of the New York City Charter, in providing for the automatic dismissal and ineligibility for future employment by the City of New York, of any employee who invokes the Fifth Amendment right to refuse to incriminate himself, contravenes the due process clause of the Fourteenth Amendment.

(3) Whether §903 of the New York City Charter, is a Bill of Attainder.

Statement of the Case.

At the time he was dismissed from his post in October, 1952, the Appellant, Harry Slochower, was an Associate Professor of Literature and German at Brooklyn College (R. 5, 17). The college, part of the New York public school system, was and is governed by the Appellee, the Board of Higher Education of the City of New York (R. 4), a corporate agency of the New York State Government. *Nelson v. Board of Higher Education of City of N. Y.*, 263 App. Div. 144 (1941), *affd.* 288 N. Y. 649 (1942).

In September, 1952, Dr. Slochower was summoned to appear before a sub-committee of the United States Senate Committee on the Judiciary (R. 5-6). The sub-committee was, purportedly, conducting hearings on espionage, sabo-

tage and the operation of the Internal Security Act of 1950 (R. 15). Dr. Slochower was questioned by the sub-committee on September 24, 1952. He was not asked about any act or advocacy of espionage, sabotage or subversion. He was not asked about his qualifications or his work, or his conduct as a teacher. He was not asked about present beliefs or present membership in any organization thought to be subversive. The Committee was interested primarily in determining whether Professor Slochower had been a communist in 1940 or 1941.

Dr. Slochower stated voluntarily:

"I am not a member of the Communist Party" (R. 30).

He also testified:

"Within my field I have expressed myself many ways which directly and by implication are counter¹ to some doctrines held by many Communists * * *. I say within my field, I could point to a number of things I differ if not am opposed to positions held on these questions * * * by many Communists" (R. 32-33).

Professor Slochower refused however to state whether he had been a member of the Communist Party in 1940 or 1941 (R. 30). He refused on the ground that his answer might tend to incriminate him (R. 30, 32). He indicated complete willingness to answer all questions relating to his political affiliations and activities after 1941 (R. 25, 32), but the Committee did not pursue the inquiry.

On October 6th, Dr. Slochower was summarily ousted from his position at Brooklyn College (R. 7). He was dismissed without notice or hearing, though he had been a

¹ Mistakenly reported as "accounted to". The error is apparent from the context of the following answer.

college teacher for twenty-seven years and had tenure by statute.¹ The only reason given for his discharge was that he had refused to answer the questions referred to (Pf. Ex. A, R. 10-12). It was not claimed that he was guilty of any misconduct or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor Slochower was and is widely known as a scholar, lecturer, author and literary critic, and had received the Bolingen Award, and a Guggenheim Fellowship.

Professor Slochower's dismissal was held to be pursuant to §903 of the New York City Charter which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city * * * or official conduct of any officer or employee of the city * * * on the ground that his answer would tend to incriminate him * * *."² The Appellee determined that the interrogation by the Senate sub-committee related to Dr. Slochower's "official conduct" despite the repeated assertion of the sub-committee chairman that it did not (R. 5-6, 15-17).

Dr. Slochower petitioned the New York Supreme Court for an order directing the Board of Higher Education to reinstate him to his position, seniority and pension rights (R. 4-10). The petition was denied. The case comes to this court on appeal from the affirmance of the order denying the relief prayed for in the petition.

¹ New York Education Law §6206.

² The full text of the statute is printed at p. 4.

POINT I.

The New York statute is an abridgment of the constitutional immunity against self-incrimination in federal proceedings.

*"This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land."*

Constitution of the United States, Article VI.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

Constitution of the United States, Amendment XIV, Section 1.

It must be conceded that a state law would be void if it prohibited citizens, under threat of punishment, from availing themselves of the immunity against self-incrimination in the Federal courts or before Federal legislative committees. Such law would be in direct conflict with the Fifth Amendment; it would be expressly barred by the "privileges or immunities" clause of the Fourteenth Amendment; and it would be an interference with the regulation of tribunals under the exclusive jurisdiction of the Federal government. *Adams v. Maryland*, 347 U. S. 179 (1954); *Hill v. Florida*, 325 U. S. 538 (1945); *Quama v. California*, 332 U. S. 633, 640 (1948); *Edwards v. California*, 314 U. S. 160, 178, 181 (1941); *Ex Parte Hull*, 312 U. S. 546, 549 (1941); *Hague v. C. I. O.*, 307 U. S. 496, 512-514 (1939); *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230 (1934); *Terral v. Burke Constr. Co.*, 257 U. S. 529, 532 (1922); *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114 (1918); *Truax v. Raich*, 239 U. S. 33 (1915); *Crandall*

v. State of Nevada, 73 U. S. (6 Wall.) 35 (1867); *Beers v. Haughton*, 34 U. S. (9 Pet.) 329, 359 (1835); *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326 (8th Cir., 1923).

A power in the states to prevent or to punish the exercise of Federal rights would destroy the foundation of the Federal structure.

“ * * * a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system; howsoever complicated and difficult the practical accommodations to it may be.” Mr. Justice Frankfurter in *Feldman v. United States*, 322 U. S. 487, 490-91 (1944).

Though Section 903 is not in terms similar to the statute hypothesized at the beginning of this Point it had the same effect. The appellant, Dr. Slochower, was severely punished by dismissal and disqualification from future employment in the public educational system for having done no more than exercise his Constitutional rights against self-incrimination before a Federal legislative committee. The Fifth Amendment immunity extends, of course, to witnesses appearing before a Senate Committee. *Quinn v. United States*, 349 U. S. 155, 161 (1955); *Blau (Patricia) v. United States*, 340 U. S. 159 (1959).

The penalty imposed was an extremely severe one. As a practical matter Dr. Slochower was barred from all further employment in his profession.¹ *U. S. v. Lovett*, 328 U. S. 303, 316 (1946); *Cummings v. The State of Mis-*

¹ “ * * * men might as well be imprisoned, as excluded from the means of earning their bread.” John Stuart Mill, *On Liberty* (Oxford University Press, 1912) p. 41.

souri,¹ 71 U. S. (4 Wall.) 277 (1866); *Anti-Fascist Committee v. McGrath*,² 341 U. S. 123 (1951); *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *Peters v. Hobby*, 349 U. S. 331 (1955).

The Appellee argued in effect that Section 903 is not analogous to the suppositive Statute because: (1) There is no provision in Section 903 prohibiting any person from availing himself of the Constitutional immunity against self-incrimination and (2) assuming Section 903 did limit the right, the State offered something of value in exchange—employment. Or, as the court below put it, the limitation upon Appellant's exercise of the Fifth Amendment was "a condition upon * * * employment" (R. 56; *Daniman v. Board of Education*, 306 N. Y. 532, 540).

In sustaining the Appellee's first contention that Section 903 does not prohibit or limit a public employee's right to refuse to incriminate himself, the Court below noted that the Statute does not prevent the exercise of the privilege R. 54-55; *Daniman v. Board of Education*, 306 N. Y. 532, 538-540. A civil servant, the Court held, is left free to exercise his right, but if he does so, he relinquishes his job (R. 54-55); *Daniman v. Board of Education*, 306 N. Y. 532, 538-539. One may argue with equal logic that the penal law imposing a death sentence for murder does not prohibit the offense but leaves one free to commit it and be hanged.³

¹ "Depriving Mr. Cummings of the right or privilege, whichever it may be called * * * of acting as a professor or a teacher in a school or educational institution was in effect a punishment" (p. 286).

² "To be deprived not only of present government employment, but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." Mr. Justice Jackson concurring in *Anti-Fascist Committee v. McGrath*, 341 U. S. at p. 185.

³ "So when the state enacts that, if the subject does something it has a perfect abstract right to do, it shall be punished, it is thereby substantially prohibited. The Federal Penal Code * * * contains very few express commands. Most of its sections provide that who-

The provision for a penalty upon assertion of a right is as effective an assault upon the right as a direct prohibition. *Harrison v. St. L. & San Francisco R. R.*, 232 U. S. 318, 33F (1914); *Wisconsin v. Phila. & Reading Coal Co.*¹, 241 U. S. 329, 332 (1916).

Describing the requirement that city employees waive their right against self-incrimination as a "condition" of public employment is not decisive of any issue. Such condition is repugnant to the Constitution. The State may not exact the surrender of the Federal Constitutional right as a price for the opportunity of working for it, or as an exchange for any privilege it has to offer. A State's withholding of a privilege until one surrenders a constitutional right is no less an attack upon the right than imposing punishment upon its exercise. *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583 (1925); *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922); *Barrow v. Burnside*, 121 U. S. 186, 200 (1887); *Bomar v. Keyes*, 162 Fed. 2d 136 (2nd Cir. 1947); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d 992, 997 (4th Cir. 1940). See also *Regan v. New York*,² 349 U. S. 58 (1955).

In *Frost Trucking Co. v. R. R. Com.*, Justice Sutherland said:

ever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited." *Western Union Telegraph Co. v. Fear*, 216 Fed. 199, 204 (1914), aff'd, 241 U. S. 329 (1916).

¹ *Wisconsin v. Phila. & Reading Coal Co.*, involved a statute providing for the revocation of a corporation's license if it removed a case to the Federal Court. The court holding the statute void said: "Consideration of the Wisconsin statute convinces us that they seek to prevent appellees * * * from exercising their constitutional right to remove suits into Federal courts" (p. 332). (Emphasis ours.)

² The reference is to Mr. Justice Black's dissent in which, commenting on Section 903, he said, "It is a completely novel idea that a waiver device of this kind can destroy constitutional protections." The court in the *Regan* case did not consider the issues presented here.

"May it (the statute under consideration) stand in the conditional form in which it is here made? If so constitutional guaranties so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone the act here is an offer * * * of a privilege which the state may grant or deny upon a condition which the carrier is free to accept or reject. In reality the carrier is given no choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may be an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of its limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." (271 U. S. 583 at p. 594). [Matter in parentheses ours.]

It must be remembered that we are not concerned in this case with the power of a State to limit the privilege against self-incrimination, in a State court or in a State proceeding.¹ Section 903 as applied in this case affects the privilege of witnesses before a Federal tribunal. Conduct of Federal legislative hearings, and the rights that may be exercised therein, is a matter of exclusive Federal concern with which no state may interfere. *Adams v. Maryland*, 347 U. S. 179 (1954).

Where a state law interferes in an area under exclusive Federal control, it will be struck down without regard to the wisdom and purpose of the Statute; for the Federal supremacy in its sphere of operation is absolute.

"state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *United States v. Belmont*, 301 U. S. 324, 332 (1937).

See also *Weber v. Anheuser-Busch*, 348 U. S. 468, 474 (1955), *Franklin Nat. Bank v. New York*, 347 U. S. 373, 378-379 (1954), and *Bus Employees v. Wisconsin Board*, 340 U. S. 383 (1951).

In *Adams v. Maryland*, 347 U. S. 179 (1954), the court held that an immunity extended by statute to witnesses before a U. S. Senate Committee could not be violated by State action. The rule of the *Adams* case would apply with greater force to the issues presented on this appeal. What is true of a right or an immunity conferred by Federal statute is *a fortiori* true of a basic Federal immunity guaranteed in Federal proceedings by the Constitution.

¹ The power considered in *Twining v. New Jersey*, 211 U. S. 78 (1908), and *Adamson v. California*, 332 U. S. 46 (1947).

POINT II.

The appellant, Slochower, was dismissed and disqualified from public employment without due process of law.

"nor shall any state deprive any person of life, liberty or property without due process of law."

Constitution of the United States, Fourteenth Amendment, Section 1.

Due process is a concept not a set of rules. It is a synthesis of the ideas and ideals of justice and fair play rooted in our legal traditions. *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 162 (1951); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934); *Chicago, Mil. & St. Paul Ry. Co. v. Pollt*, 232 U. S. 165, 168 (1914). In his concurring opinion in *Anti-Fascist Committee v. McGrath*, *supra*, Mr. Justice Frankfurter wrote, at page 163:

"Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." * * *

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

It is respectfully submitted that the Court below erred in applying language of the due process clause literally and in failing to give appropriate consideration to the nature, procedures and purposes of the statute under consideration.

The Court below found that as Appellant had no right to government employment, he must be deemed to have accepted whatever terms were imposed by the State, including the conditions incorporated in Section 303 (R. 54-55) *Dunimin v. Board of Education*, 306 N. Y. 532, 539. Stated in the terms of the Amendment, the Court below held that Appellant was not deprived of property without due process of law because he did not have any proprietary right in his job with the government.

Appellant's rights in connection with his position are within the protection of the "due process clause" of the Fourteenth Amendment.

A state, of course, has power to impose such reasonable terms on the civil service as the public interest may dictate. But it is not, in its functioning as an employer, free of all constitutional restrictions. A state may not grant or deny employment arbitrarily. It may not, for example, grant or deny employment on the basis of race, religion¹ or national origin.² It may not, as it seeks to do in this case, exact the surrender of a federal constitutional right as a price for the opportunity of working for it. And the denial of public employment pursuant to an arbitrary law is a deprivation of a right or privilege or interest within the prohibitions of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183 (1952); *United States v. Lovett*, 328 U. S. 303 (1946); *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 (1938).

In *Wieman v. Updegraff*, the court, per Mr. Justice Clark, said:

¹ *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947).

² *Truax v. Raich*, 239 U. S. 33 (1915).

"We are referred to our statement in *Adler*¹ that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*² * * *. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York.' 342 U. S., at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. * * * We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at pp. 191-192). (Emphasis ours.)

Section 903 is an arbitrary and unreasonable law because it required the surrender of a Federal Constitutional right as a condition of continued employment.

As set forth in Point I of this brief, a statute requiring the surrender of a Federal Constitutional right in exchange for a privilege conferred by the State is an invasion of the right and an infringement of the Constitutional provisions guaranteeing it. See Discussion at pp. 10-12. A statute imposing such condition must also fail as an arbitrary denial, without due process, of the privilege conferred by the statute. *Frost Trucking Co. v. R.R. Com.*, 271 U. S. 583 (1925); *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d 992 (4th Cir. 1940).

¹ *Adler v. Board of Education*, 342 U. S. 485 (1952).

² 330 U. S. 75 (1947).

Section 903 is an infringement of the due process clause because its limitation of the Fifth Amendment immunity against self-incrimination does not serve any proper governmental objective.

In addition to the negative requirement that a law shall not be arbitrary or discriminatory, due process requires that "the means selected shall have a real and substantial relation to the object sought to be attained." *Nabbia v. New York*, 294 U. S. 502, 525 (1934).

A state government may not limit rights or privileges of its citizens unless some legitimate purpose is to be accomplished by the restriction, and the limitation of the right or privilege is germane to the purpose. *Mugler v. Kansas*, 123 U. S. 623, 661 (1887); *Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935); *Communications Ass'n v. Doubts*, 339 U. S. 382, 417 (1950); *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U. S. 483, pp. 190-192 (1952).

In this case, Section 903 was held to justify Dr. Slochower's punishment because he invoked his Fifth Amendment right in refusing to advise a Federal Legislative Committee whether he had been a Communist in 1940 or 1941.¹ It would be difficult to conceive of any proper objective of a City or State government that would justify limitation or punishment of rights extended in a Federal proceeding. In addition, there was no reasonable relation between Appellant's exercise of his constitutional rights before the Senate sub-committee and his employment by the State. The invocation of a constitutional privilege, one recognized as a fundamental liberty of a citizen in a free society, *Quinn v. United States*, 349 U. S. 155, 164-162

¹ Had Dr. Slochower answered falsely, or refused to answer the question on any other ground, or had he contemptuously refused to answer without giving any reason for his refusal, Section 903 would not have been applicable (R. 54). *Dunham v. Board of Education*, 306 N. Y. 532, 538.

(1955) certainly cannot be deemed a breach of duty to the State.

The Appellee and the Court below indicated that the government purpose, in the enforcement of Section 903 is the elimination of Communists from the public school system' (R. 56-57). *Danman v. Board of Education*, 306 N. Y. 532, 540-541. If that is the objective of the statute, the abridgement of a constitutional right is not a reasonable or an appropriate means of accomplishing it. *Schneider v. State*, 308 U. S. 147, 162 (1939). Judge Desmond in his dissenting opinion in the New York Court of Appeals wrote "If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so nor has this Court hesitated to enforce them (See the "Feinberg Law") Education Law §3022 * * * (R. 61; *Danman v. Board of Education*, 306 N. Y. 532, 545).

The Court at Special Term strained to find some relationship between the means used (the dismissal of Dr. Slochower in 1952 because of his refusal to state whether he had been a Communist in 1940 or 1941) and the objective of the statute (the elimination of Communists in the school system). The court reasoned: since the Communist Party is dedicated to the destruction of the United States Government teachers who were or may have been members

"It is apparent from a consideration of the history of the statute that its purpose was to coerce public employees to cooperate in investigations by local authorities into corruption and malfeasance in the government service. It cannot be said that Dr. Slochower failed to cooperate with the State government, or the department employing him. The record indicates that when questioned by his faculty board, and by a Committee of the New York Legislature, Dr. Slochower did not refuse to answer the questions relating to membership in the Communist Party (R. 29)

"must be deemed committed to that destruction" (R. 43) and may poison the minds of their students (R. 44).

The suggestion that a teacher's former membership in the Communist Party is pertinent to the affairs of the City because he may seduce his students or incite them to revolution, assumes that all former Communists sought to overthrow the government by force and violence and that one is forever corrupted by or committed to an opinion he may have once held but long since disavowed. There is no basis in fact or in law for either assumption.

It has not been adjudged that the communist organization was dedicated to the overthrow of the United States government in 1940 or in 1941. The organization during that period was not the party now in existence. In 1940 the communist organization dissolved its formal ties with the Soviet Union and the Communist International. 1941 Britannica Book of the Year, a Record of the March of Events of 1940, p. 182. In 1941 and during the war years, the Communist Party advocated national unity and cooperation with the United States government. 1942 Britannica Book of the Year, a Record of the March of Events of 1941, p. 190; (see also, 1945 Britannica Book of the Year, a Record of the March of Events of 1944, p. 203). And see *Schenck v. United States*, 329 U. S. 118 (1943).

As the indictment charged in *United States v. Dennis*, 341 U. S. 494 (1951), the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. It was determined that the purpose and aim of the *new* party, not its predecessor, is the destruction of the government by violence (341 U. S. at p. 517).

Even if the communist organization had been dedicated at all times to violent revolution, it cannot be assumed that all persons who were or may have been members, advocated violence. To do so is to impute guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *Bridges v. Wixon*, 326 U. S. 135, 142-150 (1945); *Schneiderman v. United States*, 320 U. S. 118, 146 (1943); *DeJonge v. Oregon*, 299 U. S. 353, 362-363 (1937); *Herndon v. Lowry*, 301 U. S. 242, 258, 261-263 (1937). The claim that the questions relating to possible affiliation with the Communist Political Association in 1940 and 1941 is germane to one's conduct as a teacher in 1952 presumes guilt not by present association but by an inferred former association.

The Appellee also argued below that the questions about membership in the Communist Party in 1940 and 1941, related to Dr. Slochower's present "official conduct" because evidence of past association would tend to establish present association. In some circumstances, the continuance of a fact may be presumed from proof of its prior existence. But the presumption of continuance cannot override reason. *Maggio v. Zeitz*, 333 U. S. 56, 66 (1948). The continuance of anything so transitory as a political affiliation cannot be presumed from its purported existence at a remote time. (See *Wieman v. Updegraff*, 344 U. S. at p. 191.)

When one attempts to prove present affiliation by alleging its existence 12 years ago, it may be assumed that there is no evidence to support the inference that it existed in the interim, of that more recent evidence is to the contrary. As stated in *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses*, 96 Fed. 2d 30, at p. 36 (8th Cir. 1938):

“It is a general rule that a prior or subsequent existence is evidential of a later or earlier one But the limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case. Always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference.” (Emphasis ours.)

See also *In re Luna Camera Service*, 157 Fed. 2d 951, 953 (2d Cir. 1946); *Brune v. Fraidin*, 149 Fed. 2d 325, 327 (4th Cir. 1945).

The procedure under the statute violates due process.

Forfeiture of office is not the only penalty inflicted by the statute. Under its terms Appellant is also permanently disqualified from “election or appointment to any office or employment under the city or any agency”. Despite the severity of the penalty, Dr. Slochower was not notified that there were charges against him, he was not advised that there was to be a hearing of the charges, he was not afforded an opportunity to be present at the “trial”, or to hear the evidence against him, or to offer a defense or an explanation. On October 6, 1952, the members of the Appellee Board met in closed session, and after a consideration of the evidence presented against Dr. Slochower, and nothing more, “resolved” that his employment was terminated “pursuant to the provisions of Section 903 of the New York City Charter” (Pt. Ex. A, R. 10-14). In *Peters v. Hobby*, 349 U. S. 331, 352 (1955) Mr. Justice Douglas, in his concurring opinion said “one of man’s most precious

liberties is his right to work. When a man is deprived of that liberty without a fair trial he is denied due process."

A "fair trial"—one that would meet the procedural requirements of due process includes: reasonable notice of the charges; *In Re Oliver*, 333 U. S. 257 (1948); *United States v. Cruikshank*, 92 U. S. 542, 558 (1875); the right to a hearing *Shields v. Utah Idaho R. Co.*, 395 U. S. 177 (1938); *Morgan v. United States*, 304 U. S. 1 (1938); *Palko v. Connecticut*, 302 U. S. 319, 327 (1937); an opportunity to examine the evidence and to cross examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel, *In Re Oliver*, *supra*. *Motes v. United States*, 178 U. S. 458, 467, 471 (1900); *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 93 (1913).

The Appellant was denied all of the fundamental safeguards necessary to assure a just and fair consideration of his case.

¹ The court did not, in *Peters v. Hobby*, pass on the question of whether a government employee is entitled to a fair hearing in a proceeding for removal on loyalty grounds. The question was left open for future determination.

In the instant case Appellant's discharge pursuant to Section 903, was, under the terms of the statute, a determination that he is ineligible for future employment. Whether or not he was entitled to a hearing in connection with his dismissal Appellant was entitled to a hearing in connection with the determination of his disqualification for future employment. "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally." Mr. Justice Jackson, concurring in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 185. See also concurring opinions in the same case of Mr. Justice Black, 341 U. S. at pp. 142-143, Mr. Justice Frankfurter, 341 U. S. at pp. 149, 165-6, and Mr. Justice Douglas, 341 U. S. at pp. 174-183.

POINT III.

Section 903 is a Bill of Attainder prohibited by Article I Section 10 of the Constitution.

*No State shall * * * pass any Bill of Attainder.*

Constitution of the United States, Article I,
Section 10.

A Bill of Attainder, as defined by this court is a "legislative act which inflicts punishment without a judicial trial". *Cummings v. The State of Missouri*, 71 U. S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U. S. (4 Wall.) 333 (1866); *United States v. Loret*, 328 U. S. 303, 315 (1946).

Section 903, in providing for Appellant's removal and permanent disqualification from government employment, inflicted "punishment" (See discussion at pp. 9-10 of this brief). And no one could pretend that Appellant received a "judicial trial".

Conclusion.

For the reasons outlined Section 903 of the New York City Charter should be declared unconstitutional, and the order of the New York Court of Appeals in this case should be reversed with directions to grant the relief prayed for in the Petition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant,

THE BOARD OF HIGHER EDUCATION OF
THE CITY OF NEW YORK,

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

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Fifth Amendment

Fourteenth Amendment

New York City Charter,

Section 90³

Rules Supreme Court United States 16.1(b)

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Griswold, *the Fifth Amendment Today* 2-7Cardozo, *The Paradoxes of Legal Science*, p. 48

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant,

v.s.

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

In the first point of his main brief the Appellant Slochower discusses the conflict between Section 903 of the New York City Charter and the Fifth and Fourteenth Amendments of the Constitution. The argument in substance is that the statute, in denying public employment to one who asserts the Fifth Amendment right against self-incrimination violates the Fourteenth Amendment prohibition against the abridgment of immunities of United States citizens.

The Appellee does not deny the force of that argument. It seeks to preclude Appellant from raising the question on the ground that it was not presented in the state courts.

The question of whether Section 903 is an abridgment of the constitutional immunity against self-incrimination was properly raised below and is properly before the court.

The questions presented in the first point of Appellant's brief are properly before this Court and its jurisdiction to pass on the issues must be sustained, for the question was argued below and was considered by the court below.

The Appellee's brief states (at p. 9), "The Appellant did not argue the question of possible conflict between Charter Section 903 and the Fifth Amendment in the New York courts. Accordingly it should not be considered by this court." The brief states further (at pp. 8-9), "At no time in any of the state courts was any reference to the Fifth Amendment made by petitioner." The Appellee's statements are at variance with the opinion of Judge Desmond in the court below. As Judge Desmond noted, the question was argued by Appellant and also by the Appellee. "All sides concede," he wrote, "that, aside from the supposed applicability of Section 903, the teachers could not be deprived of their positions for exercising their Fifth Amendment right (see *Matter of Grace*, 282 N. Y. 428, 434)" (R.⁶¹) *Daniman v. Board of Education*, 306 N. Y. 532, 545.

The citation of *Matter of Grace* indicates that the court below considered as a matter in issue the precise question that Appellee claims was not previously submitted.¹ The *Grace* case, *supra*, was a proceeding to discipline an attorney because of his refusal to waive immunity against self-incrimination. The New York Court of Appeals, setting aside the attorney's suspension from practice held (pp. 434-435):

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal

¹ See *Bryant v. Zimmerman*, 278 U. S. 63, 69 (1928).

right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it. *Matter of Doyle*, 257 N. Y. 244, 250. Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in *Matter of Ellis*, 258 App. Div. 558, 572, expressing the minority view at the Appellate Division: "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."

The question of the conflict between the Fifth Amendment and Section 903 was indeed the basic issue before the state courts. There can be no question that Appellant was discharged for exercising his Fifth Amendment right (R. 53-54), and Appellant sought reinstatement on the ground that he could not be discharged for that reason. Even if the conflict between the Fifth Amendment and Section 903 had not been discussed by Appellant in the state court, it is properly before this Court, for it is clear that the question was considered by the court below (R. 7, 56, 61), and a decision of the issue was necessarily involved in the case. See *St. Louis, I. M. & S. Ry. Co. v. Stockard*, 33 U. S. 582, 598-599 (1917); *Water Power Co. v. Strickland*, 152 U. S. 475, 488 (1899). Since the highest court of the state assumed that the question was presented, it must be deemed properly presented, and it is unnecessary to look further to

determine when or in what manner it was raised. *Chambers v. United States*, 324 U. S. 182, 185-186 (1945); *Ind. ex rel. Anderson v. Brand*, 303 U. S. 95, 98 (1938).

As noted before, Section 903 in limiting the Amendment Immunity against Self-Incrimination violates the Privileges and Immunities Clause. The Appellee claims that the argument with respect to the Privileges and Immunities Clause may not be made in this Court because that clause was not referred to in the court below. The Privileges and Immunities Clause was not specifically referred to in the state court. However, the argument with respect to the violation of that clause is so interrelated with the issue of the conflict between Section 903 and the Fifth Amendment that the timely raising of the one must be deemed to have preserved the other. Moreover, an identical argument is made by Appellant with respect to both the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment.²

Appellee Board concedes that the arguments with respect to the Due Process Clause are properly before this Court. The Due Process argument having been timely made in state court, the same argument may be presented on appeal in connection with the Privileges and Immunities Clause, whether or not the latter clause was relied upon in the state court. *Branniff Airways v. Nebraska Board*, 319 U. S. 590, 598-599 (1954).

The *Branniff* case involved the validity of a state tax on aircraft. In that case the Appellant contended in state court and on appeal that the tax was invalid under the Commerce Clause of Article I of the Constitution.

² Appellee's brief, p. 9.

³ Namely that the statute violates both clauses in requiring surrender of the constitutional immunity as a condition of a

because levied on property that had no situs within the state. Although the argument relating to the tax situs of the property did not raise any issue under the Commerce Clause, it did raise a substantial federal question under the Due Process Clause of the Fourteenth Amendment. This Court found that the issue under the Due Process Clause was properly raised, preserved and presented, even though that Constitutional provision had not at any time been mentioned by Appellant. So in the instant case, Appellant must be deemed to have timely raised the arguments here presented in connection with the Privileges and Immunities Clause that were submitted below with respect to the Due Process Clause.

The Appellee cites *Deucey v. Des Moines*, 173 U. S. 193 (1899) as authority to support its position that the Privileges and Immunities Clause may not be invoked on this appeal. The reference to the *Deucey* case is somewhat misleading. In that case the city of Des Moines levied an assessment against certain property, and in addition recovered a personal judgment against the owner of the property. The property owner attacked the validity of the personal judgment in the state court on the ground that it contravened the Due Process Clause of the Fourteenth Amendment. The property owner contended in this Court and, for the first time, that the assessment against the property also contravened the Due Process Clause. This Court refused to consider the question relating to the property assessment on the ground that appellant was seeking a different ruling on constitutional grounds from that sought in the state courts. The rule of the *Deucey* case obviously has no application to the case on appeal.

It is, moreover, difficult to understand why, if the federal question was not timely raised in the court below,

the Appellee failed to make that point pursuant to Revised Rules of the Supreme Court 16.1(b) on its motion to dismiss the appeal. The Appellee in its motion to dismiss did not contend that the issues were not properly raised (as it did in moving to dismiss the related appeal *Danisman v. Board of Education*, 348 U. S. 933) but only that the federal question was not substantial.

No inference of guilt, perjury, disloyalty or wrongdoing may be drawn from Appellant's assertion of right to refuse to incriminate himself.

The thesis of Appellee's argument, in the second portion of its brief, is: the exercise of the right against self-incrimination is dishonorable, therefore a statute disqualifying an employee who exercises the right is reasonable and proper. The Appellee contends that the invocation of the right "the least . . . tends to show an admission of guilt";¹ and the only other inference that may be drawn is that a person exercising the right is a perjurer.² The argument is unworthy of the Appellee and its counsel. The basic premise is completely erroneous, and the alleged authority cited to support it is either inapplicable or of no effect.³

If countenanced, the Appellee's premise would nullify and destroy the constitutional immunity. The right against self-incrimination would afford little protection indeed to those who asserted it were, by reason of the assertion, presumed guilty of the crime in question or of perjury.

¹ Appellee's brief, p. 20; emphasis ours.⁶ One wonders what Appellee considers *the most* that can be said with respect to invocation of the privilege.

² Appellee's brief, pp. 15, 19-20.

³ An argument similar to the Appellee's was offered in *Speck v. United States*, 193 Fed. 2d 1002 (9th Cir., 1952), and was summarily dismissed by the Court as "clear error." 193 Fed. 2d 1006, 1006. See also *United States v. Shughnessy*, 212 Fed. 2d 128, 131 (2nd Cir., 1954). The argument was also rejected by the court below (R. 54); *Danisman v. Board of Education*, 306 N. Y. 332, 5

At the last term, Chief Justice Warren, speaking for the Court in *Quinn v. United States*, 349 U. S. 155 at pages 161-162 (1955), said:

"The privilege against self-incrimination is a right that was hard earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. . . . The privilege, this Court has stated, was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. . . . To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose."

See Griswold, *the Fifth Amendment Today* 2-7; *Tyning v. State of New Jersey*, 211 U. S. 78, 91 (1908); *Boyd v. United States*, 116 U. S. 616, 631-632 (1886); all referred to in the footnotes to Mr. Justice Warren's opinion.

The Appellee would not merely limit the application of the privilege, it would entirely eliminate it, as a practical matter, from the Bill of Rights.

One who stands upon his Constitutional right against self-incrimination is no more to be condemned than one who stands upon the presumption of innocence, or one who demands trial by jury, or one who resists a search of his home without warrant. Those rights exist for the protection of the innocent and are not to be denied by the pretense that *only* the guilty would resort to them. The declaration of the right in the Constitution is a recognition of the justification, in fact, of the need for its existence. (See Cardozo, *The Paradoxes of Legal Science*, Columbia University Press, 1928 p. 48). So long as the immunity

against self-incrimination is guaranteed by the Constitution it must be recognized and given effect as a right basic to our political system. One who avails himself of this fundamental Constitutional right may not in law be deemed a transgressor.

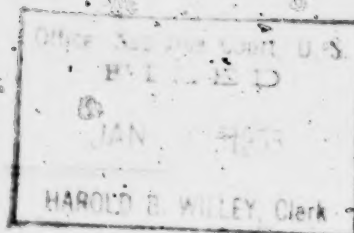
Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~405~~ 23

HARRY SCHOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

January 3, 1955

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DANIEL T. SCANNELL,
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Supreme Court of the United States

OCTOBER TERM, 1954

No. _____

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

The appellant was an Associate Professor in one of the public colleges maintained by the City of New York. His employment was terminated pursuant to New York City Charter § 903 when he invoked the Fifth Amendment to the Federal Constitution as the basis for refusing to testify concerning alleged Communist Party membership or activity.

In the courts of New York State this appeal was joined to, and argued with, the proceeding entitled *Matter of Daniman v. Board of Education of the City of New York*, 306 N. Y. 532 (1954). A Jurisdictional Statement was filed in this Court on behalf of the petitioners in the *Daniman* proceeding on September 28, 1954. The Board of Education of the City of New York submitted a motion to dismiss the appeal in the *Daniman* proceeding on November 5, 1954. This Court has not yet indicated whether or not probable jurisdiction of this case will be noted.

In the *Daniman* proceeding as well as in this appeal, the Court of Appeals of the State of New York: (1) upheld the constitutionality of New York City Charter § 903; (2) found that teachers employed in the public schools and public colleges maintained by the City of New York were city employees within the meaning of Charter § 903; (3) determined that the Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate was a duly constituted investigating body within the meaning of Charter § 903.

The petitioners' motion to reargue was denied by the New York State Court of Appeals (307 N. Y. 806). Except as to the present petitioner, the alternative motion for amendment of the remittitur was denied on the ground that no Federal constitutional question had been presented to the State Courts by the petitioners in the *Daniman* proceeding.

As appears in the *per curiam* memorandum set forth as an appendix (p. 27) to petitioner's Jurisdictional Statement, the remittitur was amended by the Court of Appeals to show that this appellant had presented certain Federal questions. The Court held unanimously that the petitioner had not been denied due process under the Fourteenth Amendment.

In addition to the *Daniman* appeal, discussed *supra*, the question of the constitutionality of § 903 of the New York City Charter has recently come before this Court for review in another case entitled *Regan v. People of the State of New York*, on which argument was heard on November 18, 1954. By permission of this Court as *amicus curiae* brief was submitted on behalf of the City of New York on December 2, 1954. We respectfully refer the Court to the arguments advanced in the *amicus curiae* brief submitted in the *Regan* case urging the constitutionality of § 903.

**No Substantial Federal Question
Presented by the Attempted Appeal**

I

We urge dismissal of the appellant's proposed appeal on the ground that there is no substantial Federal question presented. This Court has ruled that the terms and conditions of public employment and the right of tenure in state or municipal civil service do not present Federal questions unless such terms constitute a patently arbitrary or discriminatory exclusion from public service. *Weiman v. Updegraff*, 344 U. S. 183 (1952). In the *Weiman* case the Oklahoma statute made no distinction between innocent and knowing membership in a subversive organization. New York City Charter § 903 does not punish for innocent activity. It merely requires, as to certain pertinent matters, the employee's cooperation with a duly constituted body. Moreover, even if the appellant were able to demonstrate that there had been some curtailment of his civil rights as a private citizen, this Court has long recognized that the privileges and benefits of public employment permit corresponding restrictions designed to assure honest and loyal employees.

The New York state courts have interpreted § 903 of the New York City Charter to mean (1) that teachers in the public schools and colleges maintained by the City of New York are city employees within the meaning of § 903; and (2) that the Internal Security Sub-Committee of the United States Senate is a legislative body within the meaning of the statute. This Court has consistently ruled that it will be bound by the interpretation given to a state statute by the highest court of that state. *Barsky v. Board of Regents*, 374 U. S. 442, 448 (1954); *Winters v. New York*, 333 U. S. 507, 514 (1948); *Morley v. Lake Shore Railway Co.*, 146 U. S. 162, 167.

This Court has held consistently that public employ-

4
ment by a state or one of its municipalities is a matter of local concern, including the terms and conditions of such employment, the tenure rights and conduct of employees and the fixing of wages. The removal of a state or municipal employee from public employment does not present a federal question. *Preston v. Chicago*, 226 U. S. 447 (1913); *Walton v. House of Representatives of Oklahoma*, 265 U. S. 487 (1924).

No provision of the Federal Constitution deprives a state of power to modify or change the conditions of such employment as the public interest may warrant. *Higginbotham v. Baton Rouge*, 306 U. S. 535 (1939), rehearing denied 307 U. S. 649; *Dodge v. Board of Education*, 302 U. S. 74, 78-9; *Butler v. Penn.*, 10 How., 402, 416-7 (1850).

II

Assuming that the application of the provisions of New York City Charter § 903 to public employees in New York City minimizes in any degree their right to plead the Fifth Amendment as the basis for refusal to testify, such restriction is merely one factor which distinguishes public from private employment. In *Adler v. Board of Education*, 342 U. S. 485, 492, this Court reaffirmed the principle that the public employee, in exchange for such benefits as tenure, security and pension benefits, assume concurrent obligations, saying:

"It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

The requirement of Charter § 903 that a public employee answer pertinent questions in a proper investigation

is in essence the same as the ordinance of the City of Los Angeles whereby public employees were required to fore-swear that they did not advocate the unlawful overthrow of the government by force and violence and that they were not members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure to the state loyal employees. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. The constitutionality of the Los Angeles ordinance was passed on by this Court in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951). This Court said (p. 720):

“The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much.”

This same principle found its first and often quoted enunciation in the words of Mr. Justice HOLMES in *McAuliffe v. New Bedford*, 155 Mass. 216, 220:

“The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of

free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court has upheld the fixing of certain requirements for the continued practice of such professions as medicine in *Dent v. West Virginia*, 129 U. S. 114 (1889), wherein the standards for practice were elevated, and in *Hawker v. New York*, 170 U. S. 189 (1898), wherein a statute prohibited the practice of medicine by any person convicted of a felony. See also *Barsky v. Board of Regents*, 347 U. S. 442 (1954).

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the courts of the State of New York herein be affirmed.

Dated: N. Y., January 3, 1955.

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APPEL- LEE'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

Appellant,

vs.

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK

APPELLEE'S BRIEF

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2. Historical background of Charter § 903
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4. The appellant was not denied due process
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Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

—against— *Appellant,*

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK.

APPELLEE'S BRIEF

Statement of Case

The Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate met in New York City on September 8, 1952 to examine into the existence of subversive infiltration of the public school system. The Committee placed upon the record the source of its authority and the scope of its powers (R. 15). As summarized by its then Chairman, Senator Homer Ferguson, the purpose of the investigation was stated as follows (R. 15):

"We are here today to take testimony relating to subversion in our educational process. The training of our youth today determines the security of the nation tomorrow. The nature of this inquiry will be national in scope, and will relate to determine whether or not organized subversion is undermining our educational system."

We shall endeavor to sketch a broad general picture, leaving the determination of individual cases to state and local authorities.

The subcommittee gives full recognition to the fact that education is primarily a state and local function. Hence, the subcommittee has limited itself to considerations affecting national security, which are directly within the purview and authority of the subcommittee."

On October 13, 1952, at a continued hearing, an attorney for one of the witnesses attempted to have the subcommittee concede that it was not concerned with the property, affairs or government of New York City or with the official conduct of city employees. In refusing to so limit the inquiry Senator Ferguson further stated (R. 17-18):

"I think that is a fair statement, that we are not trying to dictate to the school board who they shall have as teachers, what they shall teach. But we do think that the security of this nation is determined by what teachers do teach, *whether or not they follow the Communist line in teaching, whether or not they are members of the Communist Party*, because the evidence seems to indicate clearly, ~~up to date at least,~~ and it has not been disputed by those who have been Communists, that the Communists owe allegiance to the Soviet Union and the Communist Party, and that when it conflicts in any way with the United States Government or the people, that Communism and Russia controls their thinking. — I think that is very material as to our security." (Emphasis supplied.)

Pursuant to subpoenas duly served upon them, fourteen teachers in the employ of either the Board of Education or the Board of Higher Education of the City of New York appeared before the Committee on September 10, September 23, September 24 or October 13, 1952.

After being duly sworn, each teacher was asked among other questions whether he was or ever had been a member of the Communist Party. Each witness except the appellant Slochower invoked the Fifth Amendment in refusing to answer any questions concerning present or past membership in the Communist Party. The petitioner Slochower, who appeared on September 24, 1952 accompanied by counsel, answered to the extent that he denied present membership in the Communist Party, but invoked the Fifth Amendment when questioned concerning membership prior to 1941 (R. 27-38).

Section 903 of the New York City Charter provides that if any employee of the city shall appear before any legislative committee and refuse to answer any questions relating to his official conduct on the ground that his answer would tend to incriminate him, his employment shall terminate and he shall not be eligible for any further employment by the city. Each of the Boards received certified copies of the transcript of the testimony of each of the teachers in its employ. The transcripts furnished to the Boards apprised them that questions concerning the teachers' official conduct had been asked by a duly constituted legislative committee, and that each teacher had refused to answer such questions on the grounds of possible self-incrimination. Accordingly the Boards declared vacant the positions of each of the teachers, including that of the petitioner Slochower.

An action to review these dismissals was commenced in the New York State Supreme Court. The applicability of § 903 was sustained by that Court as well as by the Appellate Division and the Court of Appeals. Notice of appeal to this Court was served on behalf of all the teachers involved. Thereafter, this Court noted probable jurisdiction with respect to the appellant Slochower and dismissed the appeals of the other teachers for want of a properly presented Federal question.

The Statute Involved

New York City Charter, § 903 provides as follows:

"Failure to testify. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Opinions Below

The petitioner challenged his dismissal in a proceeding in the New York State Supreme Court, 202 Misc. 915 (Kings Co., 1952). The Court found that petitioner was a city employee within the contemplation of New York City Charter § 903, that a federal legislative committee was among the legislative committees contemplated by the section and that the questions relating to past membership in the Communist Party had a direct bearing on his official conduct. Accordingly, the petition was dismissed (R. 38-46).

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, 282 App. Div. 717 (2nd Dept., 1953). That Court was unanimous in holding that Charter § 903 was applicable to a federal legislative committee and that questions as to past Communist Party membership related to an employee's official conduct. Two of the five judges dissented on the question of whether or not an employee of the Board of Higher Education was a city employee within the contemplation of Charter § 903. The majority and dissenting opinions are found at R. 49-52.

The New York State Court of Appeals reviewed the dismissal of the petitioner and affirmed the determinations of the lower courts, 306 N. Y. 532 (1954). The Court was unanimously of the opinion that Communism in the United States is a conspiracy against our Government and that an inquiry into past or present membership in the Communist Party is an inquiry regarding the official conduct of an employee of the City of New York. The Court further unanimously agreed that loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government, local as well as national. The majority of the Court also found that within the purview of Charter § 903 the petitioner was an employee of the City of New York and that a federal legislative committee was encompassed within the term "any legislative body". The minority dissented on these two latter conclusions (R. 52-65).

Upon a subsequent motion by the petitioner the Court of Appeals denied permission to reargue but granted the alternative request for relief by amending the remittitur so as to frame a federal question, 307 N. Y. 806 (1954) (R. 67-68). The court in denying the motion ruled unanimously that the petitioner had not been denied due process under the Fourteenth Amendment of the United States Constitution. (R. 68).

Questions Presented

- (1) May the appellant raise in this Court a Federal constitutional question which he failed to raise in the state courts?
- (2) May the state, cognizant of the benefits, tenure and stability of public employment, and endeavoring to secure the full cooperation of its personnel on matters affecting loyalty to the state and nation, establish as a qualification of employment that on matters affecting their official conduct employees may not invoke the privilege of self-incrimination as a basis for refusal to testify before duly constituted government bodies?

Summary of Argument

The appellant's principal claim in this Court is that New York City Charter § 903, is violative of his constitutional rights in that it deprives him of his position as a teacher because he invoked the privilege against self-incrimination in refusing to testify before a congressional committee.

In the state courts, the petitioner did not raise any claim with reference to the Fifth Amendment. The petitioner did refer to that portion of the Fourteenth Amendment which relates to due process. However, no claim made in the state courts by the petitioner was based on that portion of the Fourteenth Amendment prohibiting the states from abridging the privileges or immunities of citizens.

We contend that the claimed violation of the constitutional privilege against self-incrimination now urged by the petitioner was not properly raised by him in the state courts and that the invocation of a portion of the Fourteenth Amendment cannot serve to bolster the petitioner's claim with reference to the Fifth Amendment.

As to the balance of the petitioner's argument, as well as the merits of his claim concerning the Fifth Amendment, if that is properly before the Court, our contention is that the state has the right to take steps reasonably designed to ensure honesty and loyalty in its employees.

Charter § 903 came into being as the result of an official investigation by a committee of the state legislature with respect to corruption in New York City. One of the recommendations which grew out of that investigation was that public employees should not be permitted to hide behind the privilege of self-incrimination and continue in public office.

Public employment in New York State confers advantages with concurrent obligations which include cooperation with the duly constituted authorities. The state has a right to adopt any measures which are reasonably calculated to ensure honesty and loyalty among its employees in matters relating to official conduct. Section 903 bears a reasonable relationship to the evil sought to be curbed, meets the standards prescribed by this Court with reference to similar statutes, and does not constitute a denial of due process to the petitioner.

POINT I

The appellant did not raise in the state courts the question as to whether New York City Charter § 903 is violative of the constitutional privilege against self-incrimination.

The petitioner in his notice of appeal to this Court states that the first question to be considered is as follows:

1. Whether Section 903 of the New York City Charter contravenes the Fifth Amendment to the Constitution of the United States in that it imposes

as a condition to public employment, the surrender of the Federal Constitutional right to refuse to be a witness against one's self."

However it should be noted that the remittitur of the Court of Appeals makes no reference to any such federal question and does not mention the Fifth Amendment at all. The Court of Appeals stated the constitutional questions raised before it as follows (R. 67-68):

"Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter section 903, in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct; and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a 'subversive' organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment."

The fact is that at no time in any of the state courts was any reference to the Fifth Amendment made by the

petitioner. In his brief to the Court of Appeals petitioner did assert that he "was deprived of property rights without due process of law, in violation of Article I, § 10, and the Fourteenth Amendment of the United States Constitution * * *". He then argued that the right to government employment is a property right within the protection of the Federal Constitution citing *Wieman v. Updegraff*, 344 U. S. 183; (1952) and *United States v. Lovett*, 328 U. S. 303 (1946). The appellant then proceeded to argue: "It is a fundamental principle of justice that punishment may not be meted out for offense against a law unless those subject to the law are afforded a reasonable opportunity to learn what is prohibited. *Lanzetta v. New Jersey*, 306 U. S. 451; *Winters v. New York*, 333 U. S. 507; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239" (Appellant's brief to Court of Appeals, pp. 20-22).

An examination of the petitioner's references to the Fourteenth Amendment makes it clear that they did not contain even an oblique reference to the Fifth Amendment. Petitioner's entire argument was confined to that portion of Section I of the Fourteenth Amendment which provides "nor shall any state deprive any person of life, liberty or property without due process of law". At no time did the appellant urge as he does in this Court that Charter § 903 was in conflict with the provision "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This Court has consistently ruled that the particular federal constitutional question presented to the United States Supreme Court must have been raised in some unmistakable manner for review by the state court. The appellant did not argue the question of possible conflict between Charter § 903 and the Fifth Amendment in the New York Courts. Accordingly it should not be considered by this Court.

The foremost case enunciating this principle is *Deen v. Des Moines*, 173 U. S. 193 (1899), in which the appellant urged in the Iowa state court that the due process portion of the Fourteenth Amendment was violated when a personal judgment was returned against him, a resident of Illinois, for a road improvement which was assessed upon abutting property owned by the appellant in Iowa. On appeal to this Court, the appellant argued that the judgment was unconstitutional, not only for the reason he had advanced in the Iowa court, but also because the assessment was placed against his property without regard to benefit, and exceeded the actual value of the property assessed. He contended this constituted a taking of private property without just compensation, in violation of the due process required under the Fourteenth Amendment. This Court ruled that this latter question, not having been urged in the state courts, could not be considered on the appeal even though it involved a question under the due process clause of the United States Constitution.

This Court said (p. 199):

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient."

It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Company v. Massachusetts*, 6 Wall. 632. In order to be available in this court some claim or right must have been

asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States."

This Court cited *Dewey v. Des Moines*, *supra*, with approval, in *Wilson v. Cook*, 327 U. S. 474 (1946), and at pp. 483-484 reasserted the rule of that case:

"In reviewing the judgment of a state court, this Court will not pass upon any Federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented. * * * For, as we said in *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 434-435, * * * Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. * * *

See also:

Adler v. Board of Education, 342 U. S. 485 (1952)
and
State Farm Ins. Co. v. Dahl, 324 U. S. 154 (1945).

POINT II

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment reasonably calculated to assure honesty and loyalty in its employees.

1. Public employment in New York State offers advantages with concurrent obligations which includes cooperation with duly constituted authorities.

The Constitution of the State of New York provides that positions in the state and municipal service shall be filled on the basis of merit and fitness demonstrated by examination which, where practicable, is to be competitive (Art. V, § 6).

Implementing this constitutional mandate the New York State Legislature has established a civil service system whereby employees entering state or municipal service are assured continued employment provided they render good, loyal and faithful service. In order to guarantee this status the state has established by statute certain rights of tenure and protection against arbitrary dismissal, e. g., Civil Service Law § 22 (Cons. Laws, ch. 9); Education Law §§ 2573, 6206 (Cons. Laws, ch. 16); Administrative Code of the City of New York §§ 434a-14.0, 437a-12.0. It is thereby apparent that the state has created a status for its employees which is far more favorable than that enjoyed in private industry.

In order to protect the state from disloyal or dishonest employees the legislature concurrently established certain requirements such as good character and moral fitness, to be met prior to employment, which exclude persons

guilty of crimes, notoriously bad conduct or addiction to harmful habits (Civil Service Law § 14). Other requirements, if not complied with, terminate existing employment (New York City Charter § 887 payment of money for appointment or nomination; § 895 dual office-holding; § 896 officer or employee converting public property to his own use; § 901 accepting bribes. For the convenience of the Court the full text of these sections is printed in Appendix A of this brief, pp. 35-36).

New York City Charter § 903 is a part of this general plan designed to assure the state of loyal employees. The statute has for its purpose the assurance of the necessary cooperation by a public employee in any proper inquiry by an authorized investigating body inquiring into matters affecting the city or the official conduct of the employee.

2. Historical background of Charter § 903.

Pertinent to a consideration of the constitutionality of New York City Charter § 903 is a brief review of the background and history of the section. The present Charter of the City of New York was prepared by a Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and was submitted to the people at the 1936 general election. It was adopted and became effective on January 1, 1938.

In large measure, the enactment of a new charter was the outgrowth of an investigation into alleged corruption in the government of New York City in the course of which numerous city employees refused to testify as to official acts on the ground that their testimony would tend to incriminate them. The spectacle of city officers and employees resting on their constitutional right against self-incrimination brought about a realization on the part of proponents of Charter reform and the general citizenry

that public servants should not be permitted to remain on taxpayer-supported payrolls if they refused on the basis of self-incrimination to answer questions relating to official conduct before duly empowered investigating agencies. The effective way to accomplish the desired change was to incorporate corrective provisions in the charter. As stated in a final report entitled *In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10:

"My first and principal recommendation therefore is:

"THE CHARTER OF THE CITY OF NEW YORK SHOULD BE REVISED IN CERTAIN FUNDAMENTAL AND BASIC RESPECTS HEREINAFTER MENTIONED.

"The Joint Legislative Committee was constituted to investigate the affairs of the government of the City of New York. It was not designed to be a charter revision committee. As the work of the Committee progressed, it became apparent, however, that the defects in the government of the City of New York were not exclusively personal to its officials, but that the difficulty lay deeper. It became apparent that the very form and structure of the city government was in a large measure responsible for the opportunities for graft and corruption which were disclosed before the Committee."

The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the city's employees.

3. The provisions of Charter § 903 have a reasonable relationship to the evil to be curbed.

(A)

The obligation of every citizen is to testify before lawful tribunals. Professor Wigmore summed up this obligation as follows:

"For three hundred years it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. * * * It is a duty not to be guided or evaded. Whoever is impelled to evade or resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society."
(4 WIGMORE, *Evidence*, § 2192 [2nd ed., 1923].)

One of the few permitted exceptions to this general rule is that a person may not be compelled to give evidence which may tend to implicate him in a crime. The invoking of this privilege by an employee of the state in refusing to answer a question which has bearing on his official conduct permits only two possible inferences either of which disqualify: (1) the answering of the question would tend to prove the witness guilty of a crime in some way connected with his official conduct; or (2) in order to avoid answering the question propounded, the witness deliberately chose to commit perjury by falsely swearing that the answer would tend to incriminate him. Clearly, when an employee retreats behind this privilege he alone knows which alternative prompted the invoking of the privilege. Chief Justice MARSHALL summed it up in *United States v. Burr, In re Willie*, 25 Fed. Cas. 38 (1807) at p. 40:

"When a question is propounded, it belongs to the court to consider, and to decide whether any direct answer to it can implicate the witness. If this be

decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may criminate himself*, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; * * *. *If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; * * *.* (Emphasis supplied.)

The Court continuing, stated the rule as follows (pp. 40-41):

"The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

See also *Mason v. United States*, 244 U. S. 362 (1917), in which this Court cited with approval *United States v. Burr*, *In re Willie*, *supra*, and wherein the Court asserted that there must be some apparent connection between the question asked and a danger of providing a link with a crime.

A witness may not use the privilege as a shield to protect his apparent good name. In *Brown v. Walker*, 161 U. S. 591 (1896), this Court stated at p. 605-606:

"The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."

In virtually all the Courts, both Federal and State, the individual has been protected pursuant to the Constitutional privilege, from giving information which may be used to establish his guilt of a crime. In most of the states the protection under the privilege has included the preclusion of any reference during a criminal trial to the fact that a defendant failed to take the witness stand to answer the accusation.* This privilege is obviously an exception to the general rule that the public has a right to every man's evidence. The privilege should be strictly construed and the inference which ordinarily flows from failing to meet an accusation in a proper forum should apply if it will not tend to convict the invoker of a crime. See: 8 WIGMORE, *Evidence* § 2192, subd. 3 (3rd ed. 1940).

In *United States v. Mammoth Oil Co.*, 14 F. 2d 705 (8th Cir. 1926), aff'd 275 U. S. 13 (1927), the government sued to cancel certain oil leases on the ground of a bribe by the Sinclair Oil Company to a government official:

* However, see *Adamson v. California*, 332 U. S. 46 (1947), in which prosecutor and trial judge were permitted by State law to comment on the accused's failure to testify; *Palko v. Connecticut*, 302 U. S. 319, 325-326 (1937) (state statute allowing appeal by State in criminal cases); *Twining v. New Jersey*, 211 U. S. 78 (1905) (instruction by Court to jury that the jury may in a criminal case draw an unfavorable inference from the defendant's failure to testify).

One of the witnesses for the oil company invoked the Fifth Amendment. The Court clearly ruled that certain inferences must flow from his invocation of the privilege in a civil proceeding, stating in part (p. 729):

"Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? *Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart?* . . . Men with honest motives and purposes do not remain silent when their honor is assailed . . . Is a court compelled to close its eyes to these circumstances? . . . These gentlemen have the right to remain silent, to evade, to refuse to furnish information, and thus to defy the government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall and the failure of Sinclair to testify." (Emphasis supplied.)

The President of the United States by Executive Order 10491, dated October 13, 1953, ruled that the invoking of the privilege by a federal employee raised a question as to the employee's loyalty. He directed that:

"Subsection (a) of section 8 of Executive Order No. 10450 of April 27, 1953 relating to security requirements for Government employment, is hereby amended by adding thereto at the end thereof paragraph (8) as follows:

"(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct."

Section 8 of Executive Order 10450 indicates some of the things which are to be taken into consideration in determining whether or not an employee is a safe security risk. The pleading of the privilege is classed with such acts as criminal or infamous conduct, sabotage, association with spies, advocacy of the violent overthrow of the government, membership in an organization seeking such a goal, unauthorized disclosure of information and acting in the interest of a foreign government.*

The State should be under no greater disability than a private employer in being able to assure itself of loyal and trustworthy employees. Under similar circumstances the New York Times, a publication which has been in the forefront in the defense of civil liberties, dismissed a member of its staff for invoking the Fifth Amendment before the Senate Internal Security Subcommittee.**

As we have already pointed out, *supra*, pp. 14-18, the refusal to answer on the basis of possible self-incrimina-

* See also *Christal v. San Francisco*, 33 Cal. App. 564; 92 P. 2d 416 (1939), wherein police officers were dismissed for invoking the privilege even in the absence of a statute or regulation conditioning continued employment on cooperation; *Holt v. State*, 39 Tex. Cr. 282, 45 S. W. 1016 (1898), a criminal case wherein an already acquitted conspirator's credibility was attacked for having invoked the privilege on his own trial; *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532 (1894) in which the defendant had invoked the privilege when his deposition before trial was taken. On the trial the privilege being no longer available due to the running of the statute of limitations, the defendant was compelled to testify and the plaintiff was permitted to show he had invoked the privilege since it tended to show an admission of guilt.

** New York Times, July 14, 1955.

The letter dismissing the employee reads as follows:

"Dear Mr. Barnet:

I have learned to my regret that at your appearance today before the Senate Internal Security subcommittee you refused to answer questions put to you in connection with your

tion must mean either that the employee believes his answer would tend to prove him guilty of a crime or that he has no reason to believe that his answer will incriminate him, in which latter event the invocation of the privilege is perjurious. The enactment of Charter § 903 is the equivalent of a determination that in either case the employee is not fit to continue in the public service.

The reasons which prompt a witness to invoke the privilege against self-incrimination cannot be ascertained with certainty since such reasons rest in the mind of the witness. However, the least that can be said with respect to the invocation of the privilege is that it tends to show an admission of guilt. The high standards which a state has the right to exact from its employees, and the necessity that such employees be above suspicion furnishes a sufficient basis for the enactment of § 903.

The legislature in extending this requirement of cooperation by employees to a federal investigating committee was mindful that there are many areas where there is a dovetailing of city, state and federal purposes. For instance the Congress makes federal funds available for use by the states and cities for welfare relief, public housing, etc. The Senate Committee, instead of investigating nation wide subversion of the nation's educational institutions, could have as readily been investigating money grants under a Title I housing grant.

alleged association with the communist party. The course of conduct which you have followed since your name was first mentioned in this connection culminating in your action today has caused The Times to lose confidence in you as a member of its news staff. Accordingly, this will serve as notice of termination of your employment.

I have requested the auditor to pay any sums that may be due you.

Yours truly

Arthur Hays Sulzberger."

A New York City Housing Authority employee could be called upon by a Senate Committee to answer for a fraudulent allocation of federal funds. The definite relationship between the employer's official conduct and the inquiry are immediately apparent. Obviously a retreat behind the privilege against self-incrimination is incompatible with being continued as a trusted employee.

In the instant case the objective of the Senate Committee, was to investigate Communist infiltration in the nation's educational system. Clearly, the question of past or present Communist Party membership by teachers and their loyalty to the nation and the state are of vital concern both to the Senate Investigating Committee and the state which employs the teacher.

(B)

This Court in *Barsky v. Board of Regents*, 347 U. S. 442 (1954), upheld the right of the New York State legislature to provide for the disciplining of a doctor licensed by the state, for conviction of a federal crime in a federal court, even though the act committed by the doctor was not a crime under the law of New York. The appellant in that case argued that his conviction did not afford the state a basis for suspending his license. This Court ruled (p. 448) "that issue was settled adversely to him by the Court of Appeals of New York and that Court's interpretation of the state statute is conclusive here."

Accordingly, the rulings of the New York Court of Appeals that (1) the New York legislature included a United States Senate Committee within the term "any legislative committee" and precluded an employee from invoking the privilege against self-incrimination to an inquiry relating to official conduct and (2) that a ques-

tion as to past party membership has a bearing on the employee's official conduct, are conclusive on this Court.

The appellant has endeavored to raise a doubt as to the relationship between questions on past Communist Party membership and official conduct by asserting that the Communist Party prior to 1941 was not the Communist Party as it is known today. The soundness of the conclusion of the Court of Appeals on this question was demonstrated in *Dennis v. United States*, 341 U. S. 494 (1951) [Record on appeal, pp. 1504-06; 1725; 1860-64; 1972-89; 1990-92]. The aims and purposes of the Communist Party for violent overthrow of the government and the establishment of the dictatorship of the proletariat remain constant—it is only the facade that varies. The proof adduced by the government showed that the defendants dissolved the Communist Political Association to reindoctrinate its members to the avowed revolutionary aims which existed all during the years prior to 1943 when the Communist Political Association was formed. See also Report of Subversive Activities Control Board on Communist Party U. S. A. 83d Congress (Document No. 41) Determination of the Board affirmed *Communist Party of United States v. Subversive Activities Control Board* 223 F. 2d 531 (1954) appeal pending in this Court. This Board during an exhaustive hearing established that the Communist Party prior to 1941 and during the ensuing years (with the possible exception of the term of the Communist Political Association 1943-1945) was dedicated to the violent overthrow of the government as well as being under the continual domination of the Communist International.

It is significant to note that the "Report of the New York Legislative Sub-Committee Relative to the Public Educational System of the City of New York," Legislative Document #49 (1942), commonly known as the Coudert Committee, demonstrated not only that the Communist Party was dedicated to forceful overthrow of the

government but was also alarmingly successful in infiltrating the New York City Educational Systems between 1935 and 1941 (pp. 101-108, 155-157, 178-290).

Equally untenable is the appellant's assertion that in September, 1952, when he appeared before the Committee accompanied by an attorney, he could not have known that a question as to his past Communist Party membership would have any bearing on his official conduct. Approximately a year prior to that date, this Court, in *Garner v. Los Angeles*, 341 U. S. 716, 719, 720 (1951), which will be discussed more fully *infra*, sustained a municipal requirement that an employee fill out an affidavit "stating whether or not he is or ever was a member of the Communist Party of the United States of America * * *". A dismissal for refusing to execute the affidavit was sustained and the relationship of such a question to official conduct recognized.

In any event the appellant is the only one who knows what the nature and character of his acts were prior to 1941 and whether they might be a basis for a criminal prosecution against him. The Senate Committee took his invocation of the privilege at face value. It would be an odd turn of justice if an employee could by pleading self-incrimination refuse to cooperate with a duly constituted legislative body on questions having to do with his official conduct and at the same time remain secure in his position. The enactment of Charter § 903 was not designed to impinge on a right granted by the United States Constitution but rather to assure the state of loyal honest law-abiding employees.*

* For a discussion and analysis of the history and problems of the Fifth Amendment see 24 *Fordham Law Review* 19 "Problems of the Fifth Amendment" by C. Dickerman Williams.

4. The appellant was not denied due process.

The argument is made that Charter §903 violates the due process guaranteed to this appellant by the Fourteenth Amendment of the United States Constitution in that he was not notified that there were charges against him—he was not afforded an opportunity at a trial or to hear evidence against himself or to offer a defense. An examination of §903, which has been in effect since 1938,* reveals that the state legislature removed the area of discretion from the heads of the administrative agencies and clearly provided that the invoking of the privilege against self-incrimination to a question relating to the employee's official duty is inconsistent with public employment. There was nothing to try. What witnesses could be presented? The appellant is the person who triggered the statute into action.

JUDGE CONWAY, writing for the New York Court of Appeals in the instant case (R. 54), points this out very clearly.

"Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Sec-

* In *Matter of Koral v. Board of Educ. of City of New York*, 197 Misc. 221 (Supreme Court, N. Y. County, 1950, PECORA, J.), Charter §903 had been judicially interpreted to apply to a Board of Education employee who invoked the Fifth Amendment when questioned by a congressional committee about participation in a Communist espionage ring. Accordingly, the appellant could not claim that he was unaware that §903 might be held applicable to employees of the Boards of Education and Higher Education.

See also *Matter of Goldway v. Board of Higher Education*, 178 Misc. 1023 (Supreme Court, N. Y. County, 1942, HOFSTADTER, J.).

tion 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral v. Board of Educ. of City of N. Y.*, 197 Misc. 221)."

The sharp distinction between the instant situation and the facts in *Wieman v. Updegraff*, 344 U. S. 183 (1952), on which the appellant relies, is readily apparent. In the *Wieman* case, the Oklahoma Act provided for the disqualification of the employee for membership in an organization which advocated the overthrow of the government by force and violence, even though he was completely unaware and could not have readily known of these objectives of the organization. No distinction was made by the Oklahoma statute as interpreted by the highest court of that State, between innocent and knowing activity. In the instant case it is the employee who brings the privilege into play. It is he who raises the inference that his answer will provide a link in a chain of evidence to bring him within the penalties of the law. What prompts the employee to plead self-incrimination is peculiarly within his own mind. The inferences which properly flow from the invoking of the privilege provide a proper basis for disqualification.

The appellant was not without judicial remedy. He sought and received a determination from the courts as to whether or not he falls within the purview of § 903 of the New York City Charter. He contended that he was not a public employee, within the meaning of the statute; that the legislative body was not duly constituted to conduct the inquiry; that such inquiry does not properly relate to the property, government or affairs of the city, or the official conduct of its employees (New York Civil Practice

Act, Article 78 §§ 1283-1306). The New York Courts ruled adversely to the appellant on all these questions.

5. This Court has sustained the right of the State to protect itself by promulgating reasonable conditions of employment.

This requirement that a public employee answer pertinent questions in a proper investigation is in essence the same as the ordinance of the City of Los Angeles considered by this Court in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), whereby public employees were required to swear that they did not advocate the unlawful overthrow of the government by force and violence and that within the past five years they had not been members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure loyal employees to the state. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. This Court said (pp. 720-721):

"The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

This Court also recognized the obligation of a public employee to answer questions as to past conduct which may have a bearing on present fitness (p. 720):

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *Garner* case was followed by the decision of this Court in *Adler v. Board of Education*, 342 U.S. 485 (1952), in which the right of a state or municipality to inquire and the obligation of the employee to answer questions having a direct bearing on an employee's merit and fitness was reasserted. This Court, referring to its determination in the *Garner* case, said (at p. 493):

"We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

Prohibitions on the individual liberties of federal employees, as distinguished from private citizens were up-

held by this Court in *United Public Workers v. Mitchell*, 330 U. S. 75 (1945). This Court held constitutional the "Hatch Act" prohibiting Federal workers from engaging in partisan political activities. Mr. Justice REED, writing the majority opinion for this Court, said (pp. 102, 103):

"We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. . . . When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

See also: *Wieman v. Updegraff*, *supra*, wherein this Court reaffirmed the right of the State to exact reasonable requirements designed to guarantee loyal employees.

This same principle found its first and often quoted enunciation in the words of Mr. Justice HOLMES in *McAuliffe v. New Bedford*, 155 Mass. 216 (1892), at p. 220:

"The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as

he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

This Court has recognized that the rights, privileges and immunities guaranteed by the United States Constitution are not absolute and unrelated to limiting circumstances. In *Dennis v. United States*, 341 U. S. 494 (1951), this Court speaking of the alleged unconstitutional impingement of the Smith Act on the rights of free speech, said (p. 508):

"Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *American Communications Assn. v. Douds*, 339 U. S. at 397. To those who would paralyse our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

See also *Feiner v. New York*, 340 U. S. 315. (1951); *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1941).

In his brief (p. 13) the appellant relies on the decision of this Court in *Adams v. Maryland*, 347 U. S. 179 (1954), in support of his contention that the application of Charter § 903 denies him a right guaranteed by the Constitution. The petitioner in the *Adams* case, in response to questioning before a federal investigating committee, admitted that he had maintained a gambling establishment in the State of Maryland. He was thereafter convicted in the State

courts of violation of anti-lottery laws on the basis of such testimony. This Court reversed the conviction on the ground that the very wording of the federal statute there being considered (18 U. S. C. § 3486) forbids the use of incriminating testimony given before a Congressional committee "in any criminal proceeding against him in any court". The holding in the *Adams* case was thus based not on the denial of a constitutional right but upon the construction of a federal immunity statute.

The petitioner also cites *Quinn v. United States*, 349 U. S. 565 (1955), in support of his position. That case has no bearing on the instant case. It simply asserts that a witness is entitled to the protection of the Fifth Amendment so long as it appears he is relying on the privilege even though not skillfully or accurately invoked.

The decision of this Court in *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583 (1926), relied on by the appellant, stands for the proposition that while a state may have unlimited discretion whether or not to grant a privilege, once having granted the privilege it cannot attach unreasonable or unlawful conditions to the exercise of the privilege. It has been demonstrated that Charter § 903 is reasonably calculated to separate disloyal employees from state service. Accordingly the *Frost* case has no application to the instant case. See *Watson v. Employers Liability Corp.*, 348 U. S. 66 (1954).

The appellant in the *Garner* case, *supra*, urged, as does the appellant herein, that the Los Angeles ordinance was a Bill of Attainder. In disposing of the argument, this Court held (p. 722):

"*Cummings v. Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation were

not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in *Garland's* case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall. at 379-380."

This Court distinguished the Los Angeles ordinance from the Congressional act found unconstitutional in *United States v. Lovett*, 328 U. S. 303 (1946) in the following language (p. 723):

"Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

From an examination of § 903 of the New York City Charter, it is manifest that this section is not aimed at any specific individuals as in the *Lovett* case, or a well-defined class of individuals as in *Cummings v. Missouri*, 4 Wall. 277 (1866), nor does it punish for past acts.

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court has upheld the fixing

of certain requirements whereby the standards for continued practice of medicine were elevated. *Dent v. West Virginia*, 129 U. S. 114 (1889). And in *Hawker v. New York*, 170 U. S. 189 (1898), a statute prohibiting the practice of medicine by any person convicted of a felony was upheld. See also *Barsky v. Board of Regents*, 347 U. S. 442 (1954).

When New York City Charter § 903 was enacted it provided not only that a public employee who refused to cooperate, based on a claim of self-incrimination, in effect resigned from public service, but also prescribed that such a person is unfit for further public employment. It is not unreasonable for the state, in the selection of its employees, to bar anyone who has by his assertion of the constitutional privilege against self-incrimination thwarted or attempted to hinder an investigation vital to the protection of the state. Similar provisions are found in the United States Code. See 18 U. S. C. 205, 216, 281, which involves acceptance of bribes by members of Congress; similarly 18 U. S. C. 202, acceptance of bribes by other governmental officials; and 18 U. S. C. 2381, which involves a permanent proscription from any opportunity to serve in the government for anyone convicted of treason.

The appellant asks this Court to rule that Charter § 903 is unconstitutional in that he claims it is a violation of the right of due process guaranteed under the Fourteenth Amendment to the Federal Constitution. He urges the invalidity of the entire statute not only because it provides for forfeiture of present public employment but primarily because it has made him ineligible for any future public employment under the State or City of New York.

Without conceding the validity of petitioner's argument, we urge that this permanent proscription feature is readily separable from the remaining provisions of the statute. The New York Court of Appeals has frequently ruled

that it favors severability of the various parts of a statute so that any objectionable feature can be stricken out leaving for enforcement the remaining and valid sections. *People v. Mancuso*, 255 N. Y. 463, 473 (1931); *People ex rel Alpha P. C. Co. v. Knapp*, 230 N. Y. 48, 60 (1920). No separate attack on the permanent restriction from employment was advanced by the petitioner in the Court of Appeals or any of the lower courts of the State of New York. For that reason alone, the appellant may not attack the constitutionality of this provision of the statute in this Court for the first time.

Severability of a statute is a question of interpretation of legislative intent which rests with the State courts where a State statute is involved. Had the petitioner made an argument in the state courts similar to the one now advanced, if those courts agreed with him they might well have severed that portion of the statute proscribing future public employment and declared it invalid without invalidating the entire statute.

CONCLUSION

The order appealed from should be affirmed.

New York, September 23, 1955.

Respectfully submitted,

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APPENDIX A

New York City Charter, Laws of 1934, Chapter 867,
 Adopted by Referendum on November 3, 1936,
 Effective January 1, 1938.

§ 887. CORRUPT PRACTICES.—No councilman or other officer or employee of the city shall give or promise to give any portion of his compensation or any money or valuable thing to any person, in consideration of his having been or being nominated, appointed, elected or employed as such officer or employee, under the penalty of forfeiting his office or employment and being forever disqualified from being elected, appointed or employed in the service of the city, and shall on conviction be punished for a misdemeanor.

§ 895. OFFICER NOT TO HOLD ANY OTHER CIVIL OFFICE.—Any person holding office, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioners for the taking of bail, or of the state, except the office of notary public or commissioner of deeds or officer of the national guard, or who shall hold or accept any other office connected with the government of the city, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated any office held by him under the city government: except that the mayor may accept, or may in writing authorize any other person holding office to accept, a specified civil office, in respect to which no salary or other compensation is provided. No person shall hold two city or county offices, except as expressly provided in this charter or by statute; nor shall any officer under the city government hold or retain an office under a county government, except when he holds such office ex officio by virtue of an act of the legislature,

Appendix A

and in such case shall draw no salary for such ex officio office.

§ 896. FRAUD OF OFFICER.—Any councilman or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to his office or employment, or commit any fraud upon the city, or convert any of the public property to his own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit his office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.

§ 901. PUNISHMENT FOR FALSE RETURNS AND DECEPTIVE REPORTS.—Any officer or employee of the city who shall knowingly make a false or deceptive report or statement in the course of his duty or shall, except as in this charter otherwise provided, receive compensation except from the city for performing any official duty, or shall accept or receive any gratuity from any person whose interests may be affected by his official action, shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment.

Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

Appellant,

vs.

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK

APPELLEE'S SUPPLEMENTAL BRIEF

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HELEN R. CASSIDY,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

Appellant,

—against—

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK.

APPELLEE'S SUPPLEMENTAL BRIEF

(a)

The appellant's reply brief (pp. 6-7) characterizes as unworthy the position taken by the appellee in its main brief that under the circumstances in this case certain inferences flow from the invoking of the privilege against self-incrimination by the appellant. He further asserts that it is the appellee's desire to eliminate, as a practical matter, the Fifth Amendment from the Bill of Rights.

Neither the Corporation Counsel of the City of New York nor the Board of Higher Education have any desire to eliminate the Fifth Amendment from the United States Constitution. The appellee does contend that public employees have obligations as well as rights. The right to be selected by competition and the right to tenure carry with them the obligation of being open and frank with one's employer as to matters relating to official conduct. We believe further that the Legislature which has given these rights to the appellant may expect the employee to

cooperate with a United States Senate Committee making inquiries which relate to the employee's official conduct.

When the employee cloaks himself in the privilege against self-incrimination and refuses to make full disclosure of what he knows he thereby destroys the confidence which an employer should have in an employee. This is certainly true in private employment and should be no less true in public employment, especially in the field of teaching where the highest standards of conduct are applicable.

(b)

The appellant's reply brief attempts to demonstrate that the New York State appellate courts considered the question of whether New York City Charter § 903 as applied to this petitioner constituted a violation of (1) the rights guaranteed him under the Fifth Amendment of the United States Constitution; (2) that portion of the Fourteenth Amendment which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; (3) that portion of Article VI of the United States Constitution which provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land".

Despite the appellant's present claim he does not, and indeed cannot, make a forthright denial of the statement in our main brief (pp. 8-9) that "at no time in any of the state courts was any reference to the Fifth Amendment made by petitioner". Instead, he attempts to infer to this Court that the question was argued by stating "The Appellee's statements are at variance with the opinion of Judge DESMOND in the Court below. As Judge DESMOND noted, the question was argued by appellant and also by the appellee. All sides concede", he wrote, "that, aside from

the supposed applicability of Section 903, the teachers could not be deprived of their positions for exercising their Fifth Amendment right (See *Matter of Grace*, 282 N. Y. 428, 434)”. (Appellant's Reply Brief, p. 2.)

The fact is that neither side argued the question of a conflict between the rights given under the Fifth Amendment and § 903. An examination of the appellant's brief to the Court of Appeals reveals no such argument (for the convenience of the Court a copy of his entire brief has been annexed as Appendix A to this supplemental brief). When Judge DESMOND in his dissenting opinion made the statement quoted above he was simply asserting his opinion that, upon the authority of the *Grace* case, in the absence of § 903 no teacher could be automatically dismissed for invoking the Fifth Amendment. In referring to the Fifth Amendment, Judge DESMOND did not pass upon or even refer to any possible conflict with § 903. This is emphasized by the fact that Judge DESMOND did not distinguish between the privilege against self-incrimination as guaranteed under the Fifth Amendment and the similar privilege granted by Article I, § 6, of the New York State Constitution, since the latter privilege was the one referred to in the *Grace* case.

The statement of Judge DESMOND relied on by the appellant appears in the dissenting opinion of the New York Court of Appeals in *Matter of Daniman v. Board of Education*, 306 N. Y. 532, 545. The appellant was one of the petitioners in the *Daniman* case. The appeal taken to this Court by the other petitioners in the *Daniman* case was dismissed by this Court for want of a substantial federal question after the New York Court of Appeals denied a motion to amend the remittitur so as to frame a federal question as to those petitioners (Record, 67-68, 307 N. Y. 806 (1954)). If the appellant were correct in his assertion that the Court of Appeals had considered a conflict between § 903 and his federal constitutional

rights under the Fifth Amendment it necessarily would follow that the same question was considered as to the other petitioners in the *Daniman* case. The basis on which the Court of Appeals framed Federal questions for the appellant and not for the other petitioners in the *Daniman* case is discussed *infra* at p. 4.

The appellant further contends that the conflict between §903 and the Fifth Amendment is properly before this Court because "it is clear that the question was considered by the court below (R. 50, 56, 61), and a decision of the issue was necessarily involved in the case." (Appellant's Reply Brief, p. 3)

Page 50 of the record, referred to by the appellant, quotes a portion of the majority decision of the Appellate Division. Presumably the appellant relies on the statement therein that "The charter provision does not * * * abridge the constitutional privilege against self incrimination (*Canteline v. McClellan*, 282 N. Y. 166; *McAuliffe v. Mayor of New Bedford*, 155 Mass., 216)." This statement was made to dispose of the appellant's argument in Point II of his Appellate Division brief (p. 18) in which he contended "Section 903 of the New York City Charter is an unconstitutional abridgement of rights guaranteed by Article I, Section 6 of the New York State Constitution. * * *"

An examination of the appellant's brief to the Appellate Division (copy of which is annexed hereto as Appendix B) reveals that his entire argument was confined to non-federal questions and at no point in his brief did he mention any federal question. This is further borne out by a reference to page 29 of the Appellant's Court of Appeals brief (Appendix A), where it is clear from the appellant's discussion of the prevailing opinion of the Appellate Division that he treats it as referring to the New York State Constitution and not the United States Constitution.

The appellant also refers to page 56 of the record, which quotes from the opinion of the Court of Appeals as follows: "the Charter provisions do not abridge the constitutional privilege against self incrimination". This is merely a recitation by the Court of Appeals of the holding of the majority in the Appellate Division which has been discussed above. Record p. 61, also referred to by appellant, contains the statement by Judge DESMOND already discussed herein *supra*, pp. 2-3.

(c).

The only reference to federal constitutional questions by the appellant in the New York State appellate courts appears at pp. 20-22 of the appellant's brief in the Court of Appeals. It was there urged that Slochower was deprived of a property right without due process of law in violation of Article I, §10, and the Fourteenth Amendment of the United States Constitution and Article I, §6 of the New York State Constitution. The appellant failed completely to present the question to the New York appellate courts of a conflict between his rights under the Fifth Amendment and §903 of the Charter. His argument was confined largely to the contention that he "had acquired certain rights in connection with his position including tenure and the right to a fair trial of any accusation against him."

The Court of Appeals disposed of this argument by stating (R 55-56):

"There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed

except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573 and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally by the board [fol. 247] of education and not by the city, whereas the Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used."

(d)

The appellant cites *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590 (1954) in support of his position. In that case the petitioner argued that a Nebraska state tax on its property violated the Commerce Clause of the Constitution because its property had not attained a taxable situs in Nebraska. This Court ruled (p. 599) that the basic question in the case, i. e. whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax, was one of due process. However this Court took jurisdiction because "the appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though implicit, we consider the due process issue within the clear intendment of such contention and hold such issues sufficiently presented."

In the *Braniff* case, the Court referred to *N. Y. ex rel. Bryant v. Zimmerman*, 278 U. S. 63 (1928) for the rule stated at p. 67 therein, that "No particular form of words

or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the State Court with fair precision and in due time: And if the record as a whole shows either expressly or by clear intendment that this was done the claim is to be regarded as having been adequately presented." (Emphasis supplied.)

We submit that it cannot be here validly urged that the Court of Appeals had fairly presented to it the contention that § 903 abridged the rights given under the Fifth Amendment and thereby violated that portion of the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. For the entire constitutional argument of the appellant was confined to the claim that his dismissal violated due process because he had no trial; that the sub-committee had no power to make an inquiry into official conduct; and that the Feinberg Law had been improperly given retroactive effect.

New York, October 21, 1955.

Respectfully submitted,

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APPENDIX A

To be argued by
EPIRAIM LONDON

Court of Appeals

OF THE STATE OF NEW YORK.

IN THE MATTER

of

The Application of VERA SHLAKMAN,
BERNARD F. RIESS, HARRY SLOCHOWER,
SARAH R. RIEDMAN, HENRIETTA A. FRIED-
MAN and MELBA PHILLIPS,

Petitioners-Appellants,

For an Order pursuant to Article 78
of the Civil Practice Act,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Respondent.

BRIEF FOR APPELLANT HARRY SLOCHOWER.

Statement.

The Appellant HARRY SLOCHOWER was an associate professor at Brooklyn College. The Respondent, The Board of Higher Education of the City of New York (hereinafter referred to as "the Board") governs Brooklyn College and other public colleges of the New York City public school system (New York Education Law §6201). Professor SLOCHOWER was discharged by the Board in October, 1952. He is seeking by this proceeding to be reinstated.

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on the grounds that his dismissal was wrongful and improper. The court of first instance, the Special Term of the Supreme Court, Kings County, dismissed the petition (25-29).^{*} The Appellate Division, Second Department, affirmed the order of Special Term, by a divided court, Presiding Justice NOLAN and Mr. Justice WENZEL dissenting (711-723). This appeal is taken from the order of the Appellate Division.

The opinion of the court at Special Term is reported at 202 Misc. 915, and the opinions of the Appellate Division are reported at 282 App. Div. 717, 718.

Facts.

The Appellant HARRY SLOCHOWER was an Associate Professor of Literature and of German (399, 527). On September 24, 1952, he testified before a sub-committee of the U. S. Senate appointed to investigate the administration of the Internal Security Laws (383). At the outset of the hearings, the sub-committee chairman indicated that the hearings did not relate to the state or local administration of public education (45-46), and thereafter assured counsel that the inquiry did not relate to the government or affairs of the city or the official conduct of any city employee (47, 83).

The sub-committee did not question Dr. SLOCHOWER about his loyalty to the Government of the United States or about his qualifications or his work or conduct as a teacher. He was not asked if he was a member of any organization that he knew to be subversive. The Com-

^{*} Unless otherwise indicated, numbers in parentheses refer to corresponding folios in the Papers on Appeal.

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nittee was interested chiefly in learning whether Professor SLOCHOWER was a member of the Communist Party during the years 1940-1941 (525-569).

It is worthy of note that, although the sub-committee asked the other teachers, instructors and professors involved in this proceeding about present membership in the Communist Party (93, 102, 103, 121, 122, 131), it failed to ask that question of Dr. SLOCHOWER. The Committee limited its interrogation with respect to Dr. SLOCHOWER'S Communist affiliation to the period from 1940-1941 (529-530, 532, 536, 539, 564). Indeed, Dr. SLOCHOWER stated voluntarily,

"I am not a member of the Communist Party."
(536).

and stated further,

"within my field I have expressed myself in many ways which directly and by implication are counter* to some doctrines held by many Communists. . . . I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions. . . . by many Communists" (548).

As indicated by the following colloquy the subcommittee chairman was fully aware that Dr. SLOCHOWER was willing to answer all questions relating to his political affiliations and activities after 1941 (545):

"Senator Ferguson: And outside of that period you are perfectly willing to answer the questions?"

"Mr. Slochower: Anything you want, sir."

"Senator Ferguson: I understand that."

* Mistakenly reported as "accounted." The error is apparent from the context of the following answer.

4
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But the committee apparently was not interested in pursuing that line of inquiry.

Professor SLOCHOWER refused to state whether or not he had been a member of the Communist Party in the years 1940 or 1941. He refused on the ground that his answer might tend to incriminate him (538-539). He added, "I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent" (539).

On October 6th, Dr. SLOCHOWER was summarily dismissed from his position as a college professor (399). He was dismissed without notice or hearing, though he had been a college teacher for twenty-seven years (378) and had tenure by statute, Education Law §6206. The only reason given for his discharge was that he had refused to answer the questions referred to (389-395). It was not claimed that he had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor SLOCHOWER is widely known as a scholar, lecturer, author and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

Professor SLOCHOWER's summary dismissal was held to be pursuant to §903 of the New York City Charter (the text of which is appended) which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him" The Respondent determined that the interrogation by the Senate subcommittee related to such matters despite the repeated assertion of the subcommittee chairman that it did not.

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Argument.

Dr. SLOCHOWER had tenure of office within the meaning of Education Law §6206. He could not be dismissed except for cause and only after due notice and an opportunity to defend himself at a hearing. Education Law §6206(10). The Board contends that charges, notice and hearing were unnecessary. It claims that when Charter Section 903 is applicable, all safeguards, and the statutory rules and regulations designed to protect college employees against discrimination and unlawful dismissal, are automatically abrogated. The Board, we believe, concedes that, if Charter Section 903 is inapplicable, the Appellant was wrongfully discharged, for he could not, independently of the statute, have been punished for exercising his constitutional right. *Matter of Grae*, 282 N. Y. 428, 434.

The Appellant SLOCHOWER submits:

(In Point I) City Charter Section 903 is not applicable. By its terms, the section is operative only if an employee refuses to answer questions "regarding the property, government or affairs of the city . . . or regarding the . . . official conduct of any officer or employee of the city . . ." An inquiry with respect to membership in the Communist Party in 1940 or 1941 has nothing whatever to do with the "property, government or affairs of the city" or a college professor's "official conduct."

(In Point II) Section 903 as applied, deprived Appellant of property rights without due process of law in violation of the United States Constitution and the New York State Constitution.

(In Point III) Section 903 as interpreted by the court below is an unconstitutional abridgment of the right

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against self-incrimination. The section as applied and interpreted is void and cannot be held to sanction the Appellant's dismissal.

Presiding Justice NOLAN and Mr. Justice WENZEL, in their dissent from the opinion of the court below, held that Section 903 is inapplicable on the ground that Appellants are not officers or employees of the city within the meaning of Section 903 (717-723). That point is developed in the brief submitted by the other Appellants herein. The other Appellants also argue that Section 903 does not apply to investigations of Congressional committees; and finally that the section is in derogation of the New York State Education Law, so that it may not be applied to teachers or professors employed by the Board. Those arguments are also advanced by Appellant SLOCHOWER. No purpose would be served by their repetition in this brief, and the Court is requested to consider the points submitted by the other Appellants as having also been urged on Dr. SLOCHOWER's behalf.

POINT I.

Dr. Slochower did not refuse to answer any question relating to his conduct as a teacher or relating to the government, property or affairs of the City. New York City Charter Section 903 is therefore not applicable.

The Appellant SLOCHOWER was a member of the permanent staff of Brooklyn College, and as such could not be removed or deprived of his salary except for cause and after full and fair trial of any charge against him. Education Law §6206.

As the Commissioner of Education states in the official

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Memorandum on the Administration of the Regents Rules with Respect to Subversive Activities:

"Teachers serving on tenure cannot be dismissed, *whether for subversive activities or for any other cause*, without opportunity for hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given an opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses on their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal." (Emphasis ours.)

In the instant case, the Appellant was not served with any written charges against him. He was not afforded a hearing nor an opportunity to appear or testify, to produce witnesses or to cross-examine any opposing witness. He was dismissed by simple resolution of the Respondent Board passed at a closed meeting (398).

The Board contends that Appellant's right to his job was forfeit and that all statutory and procedural safeguards to insure against arbitrary dismissal were nullified, because of his refusal to state whether he had been a member of the Communist Party in 1940 or 1941. Section 903 of the New York City Charter is said by Respondents to justify the forfeiture and abrogation of all of Appellant's rights in connection with his position.

Section 903 provides for the termination of the employment of any officer or employee of New York City who refuses, on the grounds of self-incrimination, to answer questions relating to "the property, government or affairs of the city . . . or regarding the . . . official conduct of

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any officer or employee of the city. . . .” Obviously, unless the questions not answered relate to “property, government or affairs of the city,” or “official conduct,” the section is not applicable. It is common knowledge that Section 903 was inspired by the Seabury investigations. *In the Matter of the Investigation of the Departments of The City of New York*, Final Report by SAMUEL SEABURY, December 27, 1932, pp. 101-104; *The New York Times*, April 27, 1936, p. 33, col. 4, and October 16, 1936, p. 24, col. 3. Judge SEABURY, however, proposed legislation that would apply to inquiries relating to non-official conduct as well as the official conduct of public employees. “As to public officials,” Judge SEABURY said, “I do not think the modification (of the privilege against self-incrimination) should be limited to official acts. To so limit it is to raise the question in each case as to whether the acts sought to be inquired into are official or unofficial, public or private.” (*N. Y. Herald Tribune*, May 8, 1932, p. 16, col. 3; matter in parentheses inserted.)

Despite Judge SEABURY’s opposition and admonition, the section as enacted was limited to inquiries relating to “official conduct”, and “the property, government and affairs of the city.” It is thus manifest that the legislature intended to raise the question in each case as to whether the acts inquired into are public or private, official or unofficial. See *Casey v. Murphy* (Supreme Court, New York County, Special Term, Part I), *New York Law Journal*, June 18, 1951, p. 2251, in which Mr. Justice SCHREIBER held that a public officer cannot be dismissed under Section 903 for failure to sign a waiver of immunity, unless the waiver is limited to testimony regarding “the property, government or affairs of the city . . . or official conduct of any officer or employee of the city. . . .”

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The Board does not seriously contend that the questions put to Dr. SLOCHOWER relate to the "property, government or affairs of the city," for those are words of art having a special and limited meaning. *Adler v. Deegan*, 251 N. Y. 467, 473. They relate only to matters of municipal administration outside the jurisdiction of the State government. *County Securities, Inc. v. Seacord*, 278 N. Y. 34, 38. And as Chief Judge CARDOZO noted, in his concurring opinion in *Adler v. Deegan*, 251 N. Y. at p. 485, "education is a function of the state" and matters relating thereto or to employees of the public education system, cannot be held to pertain to the "government or affairs of the city."

The Board does contend that the questions Dr. SLOCHOWER failed to answer relate to his "official conduct" within the purview of Section 903. It will be remembered that Dr. SLOCHOWER was not asked any question relating to his professional competence, or to the performance of his duties as a teacher. Nor was he asked any question relating to any impropriety or unlawful activity. He was asked only about membership in the Communist Party some 12 years past.

We think it clear from a consideration of its history and correlative laws, if not, from the plain sense of its language, that the provision of section 903 of the City Charter relating to "official conduct" applies only to acts done, or which should have been done, under color or by virtue of public office. And it was not intended to apply to the previous political affiliation of a civil service employee. It is a fundamental rule and policy of the state and city governments that the duties and tenure of civil service employees "should not be affected or influenced

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ly (their) political opinions or affiliations." *People ex rel. Garvey v. Prendergast*, 148 App. Div. 129, 133. See also *Hale v. Worstell*, 185 N. Y. 247. In furtherance of that policy, the legislature enacted Sections 25 and 26-a of the Civil Service Law, which respectively prohibit the removal of civil service employees because of political affiliation, and make it a penal offense to directly or indirectly ask the political affiliations of any employee in the civil service. The statutes, which cover appellant's position, provide:

Civil Service Law: "§25. *Recommendations for appointment or promotion*

"No recommendation or question under the authority of this chapter shall relate to political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of the rules established as aforesaid, shall be in any manner affected or influenced by such opinions or affiliations. . . ."

Civil Service Law "§26-a *Inquiry concerning political affiliations of civil service employees prohibited*

"No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the civil service of the state or of any civil division or city thereof or of any person dependent upon or related to such an employee as a test of fitness for holding office. A violation of this section shall be deemed a misdemeanor . . ."

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A Consideration of the Argument and Opinions in the Courts Below.

The following arguments were advanced, by Respondent and by the Court at Special Term, to support the contention that past membership in the Communist Party relates to a teacher's official conduct:

1. Proof of former association with the Communist Party may tend to establish present association.

2. As the Communist Party is or *may be* dedicated to the destruction of the United States Government, teachers who *were* members "must be deemed committed to that destruction" (656) and may poison the minds of their students (655-656).

3. Appellant, by refusing to answer questions relating to prior party membership, admitted indirectly that he had been committed to the destruction of the government (656-658).

4. The Feinberg Law is evidence of a legislative intent to protect school children from the subversive influence of Communists (642).

The Appellate Division, in sustaining the determination of the Special Term, that past membership in the Communist Party relates to the "official conduct" of a teacher, relied principally on the decision in *Rabouine v. McNamara*, 301 N. Y. 785. The foregoing arguments and the authority relied on by the Appellate Division will be considered seriatim:

1.

The Respondent argued below that questions relating to former membership in the Communist Party relate to

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"official conduct" because evidence of past association may tend to establish present association. In some circumstances, the continuance of a fact may be presumed from proof of its prior existence. But the presumption of continuance cannot override reason. *Maggio v. Zeitz*, 333 U. S. 56, 66. The continuance of anything so transitory as a political affiliation cannot be presumed from its purported existence at a remote time. The Court needs no data to take judicial notice that people frequently change their opinions about politics. (See *Wieman v. Updegraff*, 344 U. S. at p. 191).

When one attempts to prove present affiliation by alleging its existence 12 years ago, it may be assumed that there is no evidence to support the inference that it existed in the interim, or that more recent evidence is to the contrary. As stated in *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses*, 96 Fed. 2d 30, at p. 36:

"It is a general rule that a prior or subsequent existence is evidential of a later or earlier one . . . But the limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case. Always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, *until it ceases, or perhaps is supplanted by a directly opposite inference.*" (Emphasis ours.)

Questions relating to alleged membership in the Communist Party in 1941 cannot, therefore, be justified on the ground that they are relevant to present membership; particularly where, as in the instant case, direct evidence to prove the contrary is available (536, 545).

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2.

The suggestion that a teacher's former membership in the Communist Party is pertinent to the affairs of the City because he may seduce his students or incite them to revolt, assumes that *all* former Communists sought to overthrow the government by force and violence and that one may be forever corrupted by an opinion he may have once held but long since disavowed. There is no basis in fact or in law for either assumption.

It has not been adjudged that the communist organization was dedicated to the overthrow of the United States government in 1940 or in 1941. The organization during that period was not the party now in existence. In 1940 the communist organization dissolved its formal ties with the Soviet Union and the Communist International. 1941 Britannica Book of the Year, a Record of the March of Events of 1940, p. 182. In 1941 and throughout the war years, the Communist Party advocated national unity and attempted to cooperate with the United States government. 1942 Britannica Book of the Year, a Record of the March of Events of 1941, p. 190; 1945 Britannica Book of the Year, a Record of the March of Events of 1944, p. 203.

As the indictment charged in *United States v. Dennis*, 341 U. S. 494, the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. The alleged purpose and aims of the *new* party, and not its predecessor, were the destruction of the government by violence (341 U. S. at p. 517).

Even if the communist organization had been dedicated at all times to violent revolution, it cannot be assumed.

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that all persons who were or may have been members advocated violence. To do so is to impute guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman v. Updegraff*, 344 U. S. 183, 191; *Bridges v. Wixon*, 326 U. S. 135, 143-150; *Schneiderman v. United States*, 320 U. S. 118, 146. In the *Schneiderman* case, the court, refuting the charge that the petitioner, because he was a Communist, "advocated the overthrow by force and violence of the Government, Constitution and laws of the United States," wrote, at page 136:

" . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

And at page 154 (footnote 41):

"As Chief Justice (then Mr.) HUGHES said in opposing the expulsion of the Socialist members of New York Assembly: ' . . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion, or to mere intent in the absence of overt acts'"

In *Wieman v. Updegraff*, 344 U. S. 183, the court struck down as unconstitutional an Oklahoma statute requiring every state employee to swear that he was not, and for five years before taking the oath had not been, a member of the Communist Party or of any party or organization officially determined to be a Communist front or subversive organization. The validity of the statute was challenged by members of the faculty of a state college who refused to take the oath. The statute was, without dissent, declared unconstitutional by the United States

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Supreme Court. Mr. Justice CLARK, delivering the prevailing opinion, wrote (344 U. S. 190):

"We are thus brought to the question touched on in *Garner, Adler and Gerende**: whether the Due Process clause permits a state, in attempting to bar disloyal individuals from its employ, to *exclude persons solely on the basis of organizational membership*, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. . . .

"But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. (Emphasis ours.)

p. 191:

"Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification: it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler and Gerende* is decisive. *Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.*" (Emphasis ours.)

(See also *DeJonge v. Oregon*, 299 U. S. 353, 362-363; *Herndon v. Lowry*, 301 U. S. 242, 258, 261-263; *Bridges v.*

* Referring to *Garner v. Los Angeles Board*, 341 U. S. 716, *Adler v. Board of Education*, 342 U. S. 485, *Gerende v. Board of Supervisors*, 341 U. S. 56.

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Wixon, 326 U. S. 135, 142-143, 147-148.) If Dr. SLOCHOWER ever was a member of an organization deemed subversive, it is evident from his testimony that he must be numbered among those referred to in Mr. Justice CLARK's opinion, who have severed all organizational ties.

The Appellant SLOCHOWER has not been accused of any overt, wrongful act. The Board did not intimate that he misled any student in the 27 years that he taught at college. He did not refuse to answer any question, and indeed, was not asked about any seditious act or utterance. The only questions Professor SLOCHOWER refused to answer related to possible affiliation with a lawful political party in the years 1940 and 1941. The claim that such question relates to "official conduct" does not presume guilt by association, but guilt by *past* association.

3.

Nor can it be inferred from the mere fact that Appellant SLOCHOWER refused to answer the question, that he had been guilty of criminal or objectionable conduct or of any improper activity relating to his official conduct or the affairs of the City. No inference of guilt or wrongdoing can be drawn from the assertion of the privilege against self-incrimination. *Matter of Grace*, 282 N. Y. 428; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219; *Matter of Ellis*, 258 App. Div. 558. In the *Ellis* case, Presiding Justice LAZANSKY, wrote, in answer to the contention that an attorney was guilty of wrongdoing because of his refusal to answer certain questions on the ground of self-incrimination:

"The Constitution and the statute are written expressions of the conscience of the People. One who

abides thereby may not in law be deemed a transgressor. The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court. In law, morals and law are one; a legal act is a moral act. Invoking the privilege is a legal act, therefore, a moral act" (258 App. Div. at p. 572).

Mr. Justice LAZANSKY's opinion was in dissent from the majority of the court, but on appeal to the Court of Appeals the determination of the majority was reversed, and that of Mr. Justice LAZANSKY sustained, *Matter of Ellis*, 282 N. Y. 435.

And in *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, the court said:

p. 227:

"After the Constitution of the United States had been adopted, it was deemed important to add to it several amendments, and one of them (Art. 5) provides, among other things, that no person 'shall be compelled, in any criminal case, to be a witness against himself.' It was also incorporated into the Constitution of this State (Art. 1, §6) and more recently into the Code of Civil and Criminal Procedure (Code Civil Pro. §37; Code Crim. Pro. §10). These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights.

"When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security

which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application. . . .

p. 231:

" . . . While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as a guilty party.

4

Nor can it be claimed that the inquiry into Dr. SLOCHOWER's former political associations is relevant to a teacher's official conduct because of the provisions of the Feinberg Law (Education Law §3022). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means, *provided the teacher has knowledge of such advocacy. Lederman v. Board of Education*, 276 App. Div. 527, at p. 530, *affd.* 301 N. Y. 476, *app. dismissed*, 342 U. S. 801. By its terms no group is affected by the statute until it is determined to be subversive by the Board of Regents, Education Law §3022(2).

It was not until September 24, 1953, that the Board of Regents determined the Communist Party to be a "subversive" organization within the meaning of the Feinberg Law and §12-a of the Civil Service Law (New York Times, September 25, 1953, p. 1). The determination, effective the date of its announcement, was made exactly one year

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after the Appellant was questioned and more than eleven months after he was dismissed by the Board.

Thus, Respondent argues that the questions put to Dr. SLOCHOWER concerning matters that occurred in 1940 were relevant to his official duties in September, 1952, by virtue of provisions incorporated in a statute in September, 1953.

5

The Appellate Division, in holding that an inquiry into membership in the Communist Party 11 or 12 years ago is relevant to a teacher's "official conduct," appears to have relied on the decision of this Court in *Rabouine v. McNamara*, 301 N. Y. 785 (713). The determination in the *Rabouine* case is not apposite to the issues here presented. The *Rabouine* case involved the interpretation of a regulation permitting the Municipal Civil Service Commission to disqualify a probationary appointee if he was found to have an unsatisfactory *character or reputation*. The Commission decided, after appropriate hearing in that case, that a probationary patrolman's "general character or reputation" was "not good." (*Rabouine v. McNamara*, Papers on Appeal in Court of Appeals, fols. 58, 93). In arriving at its decision, the Commission considered evidence relating to the probationary employee's failure to serve in the armed forces, and his membership in the Communist Party within the year of the hearing (*Rabouine*, fols. 75-85, 69). There was no issue or determination in the *Rabouine* case relating to the definition, construction or application of the term "official conduct," and the case can hardly be considered controlling with respect to the questions here presented.

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We think it clear that the questions put to Dr. SLOCHOWER were not, at the time of his interrogation, related to his official conduct or the affairs of the city within the meaning of Charter Section 903. If there is any doubt on that point, it must be resolved in favor of the Appellant. As the Justices dissenting from the majority of the Appellate Division in this case observed, Section 903 provides for a forfeiture of employment or office (722). It must, therefore, be narrowly construed, and its application may not be enlarged by implication or by a broad construction of its language. *Crane v. Monaghan* (Special Term, Supreme Court, New York County) New York Law Journal, May 12, 1953 at p. 1589. See also *Guessefeldt v. McGrath*, 342 U. S. 308; *Matter of Benedict v. La Guardia*, 252 App. Div. 540, 544, affd. 277 N. Y. 674.

POINT II.

Appellant Slochower was deprived of property rights without due process of law, in violation of Article I, §10, and the Fourteenth Amendment of the United States Constitution, and Article I, §6, of the New York State Constitution.

The right to government employment (where it is denied as a punitive measure) is a property right within the protection of the Federal and State constitutions. *Wieman v. Updegraff*, 344 U. S. 183; *United States v. Lovett*, 328 U. S. 303; *Matter of Hamilton v. Brennan*, 203 Misc. 536. As the court, in *Wieman v. Updegraff*, said in commenting on references to its earlier opinions in *Adler v. Board*

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of Education, 342 U. S. 485, and *United Public Workers v. Mitchell*, 330 U. S. 75:

"We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms'. *United Public Workers v. Mitchell* . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York.' 342 U. S. at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at pp. 191-192).

The Appellant Dr. SLOCHOWER had acquired certain rights in connection with his position, including tenure and the right to a fair trial of any accusation against him. The Board maintains that Dr. SLOCHOWER was deprived of those rights by the 'automatic' operation of the punitive provision of City Charter section 903.

It is a fundamental principle of justice that punishment may not be meted out for offense against a law unless those subject to the law are afforded a reasonable opportunity to learn what is prohibited. *Lanzetta v. New Jersey*, 306 U. S. 451; *Winters v. New York*, 333 U. S. 507; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239. The Appellant in the instant case could not have known, at the time of the inquiry in question, that it related (as Respondent claims) to his "official conduct" and therefore was within the comprehension of section 903.

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The investigating sub-committee was not empowered to consider, and specifically stated that its questions would not be directed to "official conduct of city employees" (46, 47, 76, 83).

Moreover, at the time of the inquiry, there had been no determination under the Feinberg Law (Education Law §3022) that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility. The retroactive application of that determination is constitutionally prohibited. COOLEY, A Treatise on the Constitutional Limitations, 8th Edition, Vol. I, p. 545; *Cummings v. The State of Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *United States v. Lovett*, 328 U. S. 303. As the court held in *United States v. Lovett*, 328 U. S. 303, 316:

"No one would think that Congress could have passed a valid law, stating that after investigation it found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' *defined that term for the first time*, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a State or by the United States." 328 U. S. 303, 316. (Emphasis supplied.)

POINT III

Section 903 of the New York City Charter is an unconstitutional abridgment of rights guaranteed by Article I, Section 6 of the New York State Constitution. The Section is void and of no effect and cannot be held to sanction the appellant's dismissal.

Article I, Section 6, of the New York Constitution guarantees the right against self-incrimination to all within its purview. The right obtains in legislative investigations as in other legal proceedings. *Matter of Doyle*, 257 N. Y. 244. The single constitutional limitation to that right, hereinafter discussed, does not apply to this case.

Section 903 abridges the right to refuse to give answers which may tend to incriminate, for it directs the dismissal of a city officer or employee who exercises the right. Coercion to relinquish a constitutional right by threatening discharge from employment, or disbarment from a profession is a curtailment of the right. *Matter of Ellis*, 258 App. Div. 567-568, 572.* A statute curtailing a constitutional right or privilege, or which evades even an implied purpose of the constitution, is void and of no effect. *People ex rel. Bolton et al. v. Albertson*, 55 N. Y. 50, 55; *Matter of Hopper v. Britt*, 203 N. Y. 144, 149; *People v. Allen*, 301 N. Y. 287, 290.

It is unnecessary to consider at this time whether public employment is a right, or a privilege upon which special conditions may be imposed, for a statute may not condition a privilege or the continuance of a privilege upon the relinquishment of a constitutional right. *Frost*

* The references are to Presiding Justice LAZANSKY's dissent. See comment at p. 17 of this brief.

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v. Railroad Commission, 271 U. S. 583, 593. See also, discussion at pp. 20-21 of this brief.

Article I, Section 6 of the Constitution of the State of New York states:

"No persons shall . . . be compelled . . . to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall . . . be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Particular attention is directed to the proviso permitting the discharge of public officers who refuse *before grand juries*, to waive immunity or to answer questions relating to the conduct of their office. Presiding Justice LAZANSKY, referring to it in *Matter of Ellis*, 258 App. Div. at p. 575 said:

"It should be noted that the failure to sign a waiver of immunity applies only to testimony of a public officer before a grand jury and concerning the conduct of his office or the performance of official duties. It does not refer to a public officer called to testify before a grand jury concerning the acts of any other persons; *it does not apply in any wise to legislative investigations or to those directed by the Governor or the courts.*" (Emphasis ours.)

Section 903 of the Charter, it will be remembered, provides for dismissal of an officer or civil servant who refuses to waive immunity or to answer questions in an in-

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quiry before "any legislative committee or any officer, board or body authorized to conduct any hearing."

The express inclusion of the single exception (relating to inquiries before grand juries) to the right granted by the Constitution bars any other exception or qualification. New York Statutory Construction Law, Sections 211, 212, 213 and 240. That canon of interpretation applies with greater force in the construction of constitutional provisions, for the language of the constitution is presumed to be selected with greater care and exactness. RULES OF CONSTITUTIONAL INTERPRETATION, Section 7; *Matter of Wendell v. Lavin*, 246 N. Y. 115; *People ex rel. Gilbert v. Wemple*, 125 N. Y. 485. Under that rule Article I, Section 6 of the Constitution must be held to prohibit the enactment of any law providing for punishment or discharge from office of any person because of refusal to testify on the grounds of self-incrimination, in any inquiry other than one before a grand jury.

We shall not rest on a rule of interpretation. As will be shown, it was the stated intent of those who drafted the proviso to Article I, Section 6 of the Constitution to preclude any statutory abridgement of the right against self-incrimination in any inquiry other than one before a grand jury.

Before January 1, 1939, the

"... nor shall he be compelled in any criminal case to be a witness against himself" (Constitution of the State of New York, 1894, Art. I, Section 6).

The proviso permitting discharge of officers who refuse to testify or waive immunity before a grand jury, was added by an amendment adopted by the Constitutional

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Convention of 1938, (McKinney, Constitution of the State of New York, pp. 292-293). The first draft of the proviso submitted to the Convention was very much broader than that finally adopted. At the suggestion of Mr. Justice POLETTI, the penalty therein provided, of removal from office for refusal to testify or waive immunity, was limited to inquiries relating to the official duties of the public officer questioned. New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586. Thereafter, on motion of Mr. Justice MARTIN, the proviso was again amended to further limit its application to officers who refuse to testify before a grand jury. Revised Record, vol. III, p. 2588, vol. IV, pp. 2599-2600. That the Convention intended by so limiting the proviso, to prevent any further invasion of the constitutional right against self-incrimination is abundantly clear from the following, extracted from the minutes of the Convention:

New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586:

"Mr. Poletti: . . . the committee gave very careful study to this matter. In fact it amended the proposal of Mr. Halpern in several respects; in one respect a very important change, and I think we should note it here. This proposal is directed to public officers, that is, it intends to set them aside and treat them specially, but it deals with public officials only with respect to their official duties. It does not relate to non-official duties. . . ."

p. 2588:

"Mr. Martin: I offer an amendment as follows: on line 6, after the word 'answer' insert 'before a grand jury.' Then a public official is protected; otherwise he is not protected. I have seen investigations

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when I was district attorney, which were nothing but political, and where they attempted to make officials testify before committees, and where those officials were just being bullyragged before the committee. Put him before a grand jury. He has no counsel there and he is protected before the grand jury. . . ."

p. 2589:

"Mr. Martin: . . . Before the grand jury he would be protected. We would not have the newspapers putting in the part of his testimony they liked and leaving out the part that was favorable to him. This will be a general protection to the people and will be a general protection to the public official, and would be in the interest of justice."

p. 2590:

Mr. Martin: My first amendment is the substantial one. It goes right to the core of the question. Public officials should not be bullyragged by opposing partisans or someone who has a grudge against them, but at the same time they should not be excused; they should go before a grand jury and testify. As far as I am concerned, my amendment is intended to protect the public official, and to assure all that he is not the prey of anybody who has a grudge against him."

p. 2592:

"Mr. Halpern: My objection to Judge Martin's amendment is it prevents the application of this salutary and very important principle to legislative investigations."

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"Mr. Martin: . . . As the law is today, they are not compelled to answer before anybody, and they are not compelled to testify. We are broadening the

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law, but in our effort to broaden the law, we should not destroy the whole body of criminal law by making a public official take the stand in a case or resign from his office, and we should protect him the same as we protect every other citizen. . . ."

Vol. IV, p. 2597:

"Mr. Martin: If you are going to forfeit the office of every public official who feels that he is being tried before some committee, even before a Governor, for political reasons, then public officers are certainly in a bad position in this State. I think if we limit it right to the grand jury, we will have accomplished justice to all."

p. 2599:

"Mr. Martin: I do not believe in allowing investigation when the investigator will first send for the newspapers, and then when the public official comes in, try to crucify him. *No matter whether he is a Republican, a Democrat, or a Communist, it makes no difference to me, I think that public official should be protected the same as any other citizen and should not be abused by these so-called investigations*, many of which are going on today throughout this whole country, and are for no other purpose than to annoy the public officials.

I say this amendment would stop all that and protect everyone involved." (Emphasis ours.)

It is evident from the foregoing that Article I, Section 6 of the New York constitution as amended was designed to protect public officials as well as all other citizens from loss of office or other punishment because of refusal to testify about political affiliation, or because of refusal to testify before a legislative committee. The reasons the constitutional amendment was so drawn are explicitly

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and forcefully set forth in the quoted statements, and further comment would be unwarranted.

The prevailing opinion of the Appellate Division in this case cites *Canteline v. McClellan*, 282 N. Y. 166, and *McAuliffe v. New Bedford*, 155 Mass. 216, as authorities to support the conclusion that "The charter provision does not abridge the constitutional privilege against self incrimination" (714-715). Neither case is pertinent. In *Canteline v. McClellan* the appellants, both police commissioners, refused to waive immunity when called before a grand jury. They were threatened with suspension pursuant to the proviso of the New York State Constitution hereinbefore quoted (which provides for removal of officers failing to waive immunity before a grand jury). This Court in the *Canteline* case held that the proviso of Article I, §6, of the New York State Constitution, and its proposed application did not offend the United States Constitution. But we are not here challenging the validity of Article I, §6, of the New York Constitution. We submit, on the contrary, that Section 903 of the City Charter is void because it violates the letter and intent of that section of the State Constitution.

McAuliffe v. New Bedford, 155 Mass. 216, has no greater bearing on the issues in this case. The petitioner McAULIFFE, also a police officer, was removed for violating a department rule against solicitation of funds for political purposes. Mr. Justice HOLMES, speaking for the court, held the department rule in question to be valid. The question of the privilege against self-incrimination was not involved or even referred to in the recital of the facts, the argument, or the opinion in the case.

*Appendix A***Conclusion**

Section 903 was here applied to warrant the dismissal of Professor Slochower for refusing to answer questions relating to his political affiliation in 1940 and 1941, in an inquiry conducted by a legislative committee. The section itself did not authorize the action taken. Moreover, Section 903, and the Respondent's application of the section offend the provisions, purpose and spirit of the United States and New York State Constitutions.

The order dismissing the petition of the appellant Slochower should be reversed, and the prayer of the petition granted.

Respectfully submitted,

LONDON, SIMPSON & LONDON,
Attorneys for Appellant, Harry Slochower.

EPHRAIM S. LONDON,
SHERMAN P. KIMBALL,
Of Counsel.

APPENDIX B

To Be Argued by
EPIRAIM LONDON.

Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

The Application of VERA SHLAKMAN,
BERNARD F. RIESS, HARRY SLOCHOWER,
SARAH R. RIEDMAN, HENRIETTA A. FRIED-
MAN and MELBA PHILLIPS,
Petitioners-Appellants,

For an Order pursuant to Article 78-
of the Civil Practice Act,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,
Respondent.

BRIEF FOR THE APPELLANT HARRY SLOCHOWER.

Statement.

This appeal is from an order in a proceeding instituted under Article 78 of the Civil Practice Act. Appellants were instructors and professors in colleges in the New York public school system. Respondent (hereinafter referred to as "the Board") is the governing body of the public colleges in New York City, Education Law §6201, 6202. On October 6, 1952, the Board discharged Appel-

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lants without charges; notice or hearing (376, 53-54 Par. 13)* "pursuant to the provisions of Section 903 of the New York City Charter" (399).

These proceedings were instituted to reinstate appellants. The petition herein alleges that appellants were wrongfully discharged, that Section 903 did not authorize their dismissal, and that appellants' constitutional rights had been violated (376, 54-64, 381-382).

The order appealed from, which was made at Special Term, Part I, of the Supreme Court, Kings County on December 11, 1952, denies and dismisses the appellants' petition (25-29).

The petitioner-appellant HARRY SLOCHOWER appears separately and this brief is filed on his behalf.

Facts.

The appellant HARRY SLOCHOWER was an Associate Professor of Literature and of German at Brooklyn College (399, 527). On September 24, 1952, he testified before a sub-committee of the U. S. Senate appointed to investigate the administration of the Internal Security Laws (383). The sub-committee did not question Dr. SLOCHOWER about his loyalty to the Government of the United States or about his work or conduct as a teacher. He was not asked if he ever advocated the overthrow of the government, or if he was a member of any organizations that he knew to be subversive. The Committee was concerned chiefly with the question of whether or not Professor SLOCHOWER was a member of the Communist Party during the years 1940-1941 (525-569). It is worthy of note

* Unless otherwise indicated, numbers in parentheses refer to corresponding folios in the Papers on Appeal.

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that, although the sub-committee asked the other teachers, instructors and professors involved in this proceeding about their present membership in the Communist Party (93, 102, 103, 121, 122, 131), it failed to ask that question of Dr. SLOCHOWER. The Committee deliberately limited its interrogation with respect to Dr. SLOCHOWER's Communist affiliations to the period from 1940-1941 (529-530, 532, 536, 539, 564). Indeed, Dr. SLOCHOWER stated voluntarily, "I am not a member of the Communist Party" (536), and stated further, "within my field I have expressed myself in many ways which directly and by implication are counter* to some doctrines held by many Communists. . . . I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions . . . by many Communists" (548). Dr. SLOCHOWER also volunteered to answer all questions relating to his political affiliations and activities during the period after 1941 (544), but the Committee was not interested in following that line of inquiry.

Professor SLOCHOWER refused to state whether or not he had been a member of the Communist Party in the years 1940 or 1941. He refused on the ground that his answer might tend to incriminate him (538-539). He added, however, "I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent" (539). Dr. SLOCHOWER also refused to state whether he had been known under an alias during the period from 1940 to 1941 (568).

* Mistakenly reported as "accounted." The error is apparent from the context of the following answer.

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On October 6th, Dr. SLOCHOWER was summarily dismissed from his position as a college professor (399). He was dismissed without notice or hearing, though he had been a college teacher for twenty-seven years (378) and had tenure by statute, Education Law §6206. The only reason given for his discharge was that he had refused to answer the questions referred to (389-395). It was not claimed that he had been guilty of any misconduct in any classroom, or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor SLOCHOWER is widely known as a scholar, lecturer, and literary critic, and has received the Bollingen Award, and a Guggenheim Fellowship.

Professor SLOCHOWER's summary dismissal was held to be pursuant to §903 of the New York City Charter (the text of which is appended) which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . ."

Argument.

The Appellant SLOCHOWER had tenure of office within the meaning of Education Law §6206. He could not be dismissed except for cause and only after due notice and an opportunity to defend himself at a hearing. Education Law §6206(10). The Board relies entirely on the provisions of Section 903 of the City Charter, which it claims is self-executing or automatic in its operation. It contends that, where an employee is dismissed under that section, there is no necessity for notice or hearing. The Board will, we believe, concede that, if Charter Section

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903 is inapplicable, the Appellant was wrongfully discharged. It could not, independently of the statute, have punished Dr. SLOCHOWER for exercising a constitutional right, *Matter of Grae*, 282 N. Y. 428, 434.

It is argued in the briefs submitted for the other Appellants that they are not employees or officers of the city within the meaning of Section 903, and it is therefore inapplicable to them. It is also therein argued that Section 903 does not apply to investigations by Congressional Committees; and finally, that the Section is in derogation of the New York State Education Law, so that it may not be applied to teachers or professors employed by the Board, even if that application was intended by the Legislature.

Those arguments are also advanced by the Appellant SLOCHOWER. No purpose would be served by their repetition in this brief, and the Court is requested to consider the points in the other Appellants' brief as having also been urged on Dr. SLOCHOWER's behalf.

It is believed that Section 903 cannot justify Dr. SLOCHOWER's dismissal for other and equally compelling reasons hereinafter discussed, namely:

1. The section is by its terms applicable only if an employee refuses to answer questions "regarding the property, government or affairs of the city. . . . or regarding the nomination, election, appointment or official conduct of any officer or employee of the city. . . ." No such questions were asked of Dr. SLOCHOWER. His discharge pursuant to the provisions of that section was, therefore, improper.

2. Section 903 of the City Charter contravenes Article I, Sec. 6 of the New York State Constitution; it is for that reason void, and no valid action may be taken thereunder.

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POINT I.

New York City Charter Section 903 is not applicable, for Dr. Slochower did not refuse to answer any question relating to his conduct as a teacher or relating to the government, property or affairs of the city.

Section 903 of the City Charter is, by its terms, limited to cases in which a city employee refuses, on the ground of self-incrimination, to answer questions relating to "*the property, government or affairs of the city . . . or regarding the nomination, election, appointment or official conduct of any officer or employee of the city. . . .*"

The words "property, government or affairs of the city" are words of art and have a special and limited meaning. *Adler v. Deegan*, 251 N. Y. 467, 473. They do not include everything pertaining to the city or its people, but are limited to matters that are outside the jurisdiction of the state government. *Adler v. Deegan*, *supra*. Education being a state function may not be considered an "affair of the city" within the purview of Section 903. As Judge CARDOZO said, in his concurring opinion in *Adler v. Deegan*, 251 N. Y. 467, at p. 485:

"There may be difficulty at times in allocating interests to State or municipality, and in marking their respective limits when they seem to come together. If any one thing, however, has been settled in this realm of thought by unison of opinion, it is the state-wide extension of the interest in the maintenance of life and health. The advancement of that interest, like *the advancement of education, is a function of the state at large*. I do not know how many statutes we shall have to uproot, nor where we shall have to draw

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the line hereafter, nor what confusion we may be inviting, if we speak differently now." (Emphasis ours.)

As that point is touched upon in the other Appellants' brief, and is implicit in the argument that college professors employed by the Board are not "employees of the city," it will not be discussed further.

It is clear from a consideration of its history that Section 903 was intended to apply only to public officers who invoked the constitutional privilege to cloak malfeasance in the performance of their official duties, and that it was not intended to deprive city employees of their privilege against self-incrimination (or of their positions if they assert the privilege) as to all possible matters of inquiry.

It is common knowledge that Section 903 was inspired by the Seabury investigations. *In the Matter of the Investigation of the Departments of The City of New York*, Final Report by SAMUEL SEABURY, December 27, 1932, pp. 101-104; *The New York Times*, April 27, 1936, p. 33, col. 4, and October 16, 1936, p. 24, col. 3. Judge SEABURY, however, proposed legislation that would apply to inquiries relating to non-official conduct as well as the official conduct of public employees. "As to public officials," Judge SEABURY said, "I do not think the modification (of the privilege against self-incrimination) should be limited to official acts. To so limit it is to raise the question in each case as to whether the acts sought to be inquired into are official or unofficial, public or private." (N. Y. Herald Tribune, May 8, 1932, p. 16, col. 3; matter in parentheses inserted).

Despite Judge SEABURY's opposition and admonition, the section as enacted was limited to inquiries relating

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to "official conduct", and "the property, government and affairs of the city." It is thus manifest that the legislature intended to raise the question in each case as to whether the acts inquired into are public or private, official or unofficial. See *Casey v. Murphy* (Supreme Court, New York County, Special Term, Part I), New York Law Journal June 18, 1951, p. 2251, in which Mr. Justice SCHREIBER held that a public officer cannot be dismissed under Section 903 for failure to sign a waiver of immunity, unless the waiver is limited to testimony regarding "the property, government or affairs of the city . . . or official conduct of any officer or employee of the city. . . ."

A public employee's membership in or affiliation with a political party is not a concern of the City unless it involves some unlawful act or conduct affecting the City. The Appellant here, it will be recalled, was not asked whether he did or said any unlawful or prohibited thing, but merely whether he was a member of the Communist Party in 1940 and 1941. Many unpleasant things have been said about Communists and the Communist Party, and they will no doubt be repeated in the Respondent's brief. Whether or not the statements made about the party are true, membership in it, as the court below conceded, is not in itself unlawful (646). Mr. Justice BREWSTER in his opinion in *Thompson v. Wallin*, 276 App. Div. 463 (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801), wrote (p. 468):

"Communism is a doctrine of ancient origin and wide concept, and a school of thought, party, group, or organization which believes in, teaches or advocates it, may or may not advocate its advance by an overthrow of our organized governments by force and

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violence. (Matter of Lithuanian Workers' Literature Society, 196 App. Div. 262). We may take notice that to do so is not an essential of its basic doctrine" (emphasis ours).

See also the opinion of this court in *Lederman v. Board of Education*, 276 App. Div. 527, at p. 530, (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801).

It must also be conceded that a teacher may not be denied employment in a state public school system merely because of his membership in the Communist Party, *Wieman v. Updegraff*, 344 U. S. 183 (decided December 15, 1952). *Wieman v. Updegraff* involved an Oklahoma statute requiring every state employee to swear that he was not, and for five years before taking the oath was not, a member of the Communist Party or of any party or organization officially determined to be a Communist front or subversive organization. The validity of the statute was challenged by members of the faculty of a state college who refused to take the oath. The statute was, without dissent, declared unconstitutional by the United States Supreme Court. Mr. Justice CLARK, delivering the prevailing opinion, wrote (344 U. S. 190):

"We are thus brought to the question touched on in *Garner*, *Adler* and *Gerende**: whether the Due Process clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies.

* Referring to *Garner v. Los Angeles Board*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Gerende v. Board of Supervisors*, 341 U. S. 56.

"But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. (Emphasis ours.)

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p. 191:

"Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner*, *Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with knowing activity must fail as an assertion of arbitrary power".

(See also *DeJonge v. Oregon*, 299 U. S. 353, 362-363; *Hendon v. Lowry*, 301 U. S. 242, 258, 261-263; *Bridges v. Wixon*, 326 U. S. 135, 142-143, 147-148.) If Dr. SLOCHOWER ever was a member of an organization deemed subversive, it is evident from his testimony that he must be numbered among those referred to in Mr. Justice CLARK's opinion, who have severed all organizational ties.

Section 25 of the Civil Service Law prohibits the removal of any public employee affected thereby, because of his political affiliations or opinions. The Appellant's position is covered by the statute which provides:

Civil Service Law: "§25. *Recommendations for appointment or promotion*

"No recommendation or question under the authority of this chapter shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of the rules established as aforesaid, shall be in any manner affected or influenced by such opinions or affiliations. . . ."

As previously noted, the Communist Party is not illegal. Its status under the section is precisely the same as that of any other lawful party. The appellant SLOCHOWER could not have been removed for stating, in answer to the question asked, that he had been or that he had not been a member of the Communist Party in 1940 or 1941; it would be strange indeed if he could be removed for refusing to answer the question. Moreover, since the question of political affiliation is by statute dissociated from offices held under the civil service law, it may hardly be said to be a matter relating to official conduct, or the affairs of the government.

A question relating solely to Communist Party membership thus has no greater relevance to the official conduct of a teacher, or to the affairs of the City, than a question relating solely to membership in the Democratic, Republican or Socialist Parties.

A Consideration of the Opinion of the Court Below.

The court at Special Term, in its opinion denying the Appellant's petition, suggested that the question relating to membership in the Communist Party is relevant to the performance of a teacher's official conduct because:

1. Students exposed to Communist teachers may

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be mentally and morally debauched, and their minds poisoned (655-656, 667).

2. Appellant, by refusing to answer questions relating to party membership, admitted indirectly that he had been committed to the destruction of the government (656-658).

3. The Feinberg Law is evidence of a legislative intent to protect school children from the subversive influence of Communists (642).

Those arguments will be considered seriatim.

1.

The suggestion that a teacher's membership in the Communist Party is pertinent to the affairs of the City because, as a Communist he may seduce his students or incite them to revolt, assumes (a) that *all* Communists seek to overthrow the government by force and violence; and (b) that given the opportunity, *all* Communists would try to inculcate their political principles. There is no basis in law or fact for either assumption. The court below imputed guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman v. Updegraff*; 344 U. S. 183, 191; *Bridges v. Wixon*, 326 U. S. 135, 143-150; *Schneiderman v. United States*, 320 U. S. 118, 146. In the *Schneiderman* case, the court, refuting the charge that the petitioner, because he was a Communist, "advocated the overthrow by force and violence of the Government, Constitution and laws of the United States," wrote, at page 136:

"... men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

And at page 154 (footnote 41):

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"As Chief Justice (then Mr.) HUGHES said in opposing the expulsion of the Socialist members of the New York Assembly: ' . . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion, or to mere intent in the absence of overt acts . . . ' "

Certainly the Appellant Dr. SLOCHOWER has not been accused of any overt, wrongful act. The Board did not intimate that he misled even a single student in the 27 years that he taught at college. He did not refuse to answer any question, and indeed, was not asked about any seditious act or utterances. The only questions Professor SLOCHOWER refused to answer related to lawful affiliation with a political party in the years 1940 and 1941. The claim that such question relates to "official conduct" does not presume guilt by association, but guilt by *past* association. It assumes that one is forever corrupted by an opinion once held and long since disavowed. It is inconceivable that Section 903 was intended to authorize the dismissal of a college professor for refusal to answer any such question.

2.

Nor can it be inferred from the mere fact that Appellant SLOCHOWER refused to answer the question, that he had been guilty of criminal or objectionable conduct or of any improper activity relating to his official conduct or the affairs of the City. No inference of guilt or wrongdoing can be drawn from the assertion of the privilege against self-incrimination. *Matter of Grae*, 282 N. Y. 428; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219; *Matter of Ellis*, 258 App. Div. 558. In the *Ellis* case, Mr. Justice

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LAZANSKY, then Presiding Justice of this Court, wrote, in answer to the contention that an attorney was guilty of wrong-doing because of his refusal to answer certain questions on the ground of self-incrimination:

"The Constitution and the statute are written expressions of the conscience of the People. One who abides thereby may not in law be deemed a transgressor. The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court. In law, morals and law are one; a legal act is a moral act. Invoking the privilege is a legal act, therefore, a moral act" (258 App. Div. at p. 572).

Mr. Justice LAZANSKY's opinion was in dissent from the majority of the court, but on appeal to the Court of Appeals the determination of the majority was reversed, and that of Mr. Justice LAZANSKY sustained, *Matter of Ellis*; 282 N. Y. 435.

And in *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, the court said:

p. 227:

"After the Constitution of the United States had been adopted, it was deemed important to add to it several amendments, and one of them (Art. 5) provides, among other things, that no person 'shall be compelled, in any criminal case, to be a witness against himself.' It was also incorporated into the Constitution of this State (Art. 1, §6) and more recently into the Code of Civil and Criminal Procedure (Code Civil Pro. §37; Code Crim. Pro. §10). These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus

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or any of the other fundamental guaranties for the protection of personal rights.

"When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application. . . ."

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p. 231:

" . . . While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as a guilty party.

3.

Nor can it be claimed that the inquiry into Dr. SLOCHOWER's former political associations is relevant to the affairs of the City because of the provisions of the Feinberg Law (Education Law §3022). That law, implementing Civil Service Law §12-a, provides for the dismissal of any public school teacher who is a member of a subversive group advocating the overthrow of the government by unlawful means, *provided the teacher has knowledge of such advocacy. Lederman v. Board of Education*, 276 App. Div. 527, at p. 530. No group is affected by the statute until it is determined to be subversive by the Board of Regents, Education Law §3022(2).

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Space permits an outline of only two of the cogent reasons the Feinberg Law cannot be resorted to in the instant case. They are:

(1) The Communist Party is not a subversive organization within the meaning of the statute, for it has not been listed as such by the Board of Regents. It is true, as the court below noted, that the preamble to the Feinberg Law refers to the Communist Party as a "subversive group" (642-643). But the preamble to the statute is not an enactment. It is merely an expression of "common report" and it cannot be considered a finding that the Party is in fact subversive. *Lederman v. Board of Education*, 276 App. Div. 463, at p. 530 (aff'd 301 N. Y. 476, appeal dismissed 342 U. S. 801).

(2) The questions asked of Dr. SLOCHOWER cannot be held to relate to the Feinberg Law because the law was passed in 1949 and is prospective in operation. *Lederman v. Board of Education*, 276 App. Div. 527, at p. 530. The questions that Dr. SLOCHOWER refused to answer were limited in time to the period from 1940 to 1941, eight to nine years before the law was passed. A retroactive application of the law would offend the United States Constitution. *Cummings v. The State of Missouri*, 4 Wall. 277, *Ex Parte Garland*, 4 Wall. 333, *United States v. Lovett*, 328 U. S. 303.

The court below also reasoned that, as membership in the Communist Party is not a crime, the Appellants had no legal right to refuse to answer any question relating to party membership (650, 652, 654-655, 657, 663, 665). It proceeded from that erroneous conclusion to another, namely: that Appellants must have been guilty of intellectual dishonesty and were, therefore, properly dis-

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charged by the Board¹ (652, 667). The court's statement (repeated five times) that one may not invoke the privilege of refusing, under the Fifth Amendment, to answer questions relating to Communist affiliation (650, 652, 654-655, 657, 663, 665), is in direct conflict with the decisions of the United States Supreme Court in *Patricia Blau v. U. S.*, 340 U. S. 159, and *Irving Blau v. U. S.*, 340 U. S. 332. With respect to the court's final conclusion: it would seem evident that Section 903, no matter how broadly interpreted, cannot be held to authorize the peremptory dismissal of teachers or college professors because of their intellectual dishonesty.

We think it clear that the questions Dr. SLOCHOWER refused to answer were entirely unrelated to his official duties and the affairs of the City. If there still be any doubt on that point, it should be dispelled by the statement of Senator FERGUSON, Chairman of the committee conducting the inquiry, to the effect that he was not concerned with the Appellants' conduct "from the point of view of the property, government or affairs of the City . . . or official conduct of the city employees" (46-47). Certainly the intent and purposes of the questioner must be considered a factor of weight in determining what matters were relevant to the questions asked.

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POINT II

Section 903 of the New York City Charter is an unconstitutional abridgment of rights guaranteed by Article I, Section 6 of the New York State Constitution. The Section is void and of no effect and cannot be held to sanction the appellant's dismissal.

Article I, Section 6, of the New York Constitution guarantees the right against self-incrimination to all within its purview. The right obtains in legislative investigations as in other legal proceedings. *Matter of Doyle*, 257 N. Y. 244. The single limitation to that right, hereinafter discussed, does not apply to this case.

Section 903 directs the dismissal of any city officer or employee who avails himself of the constitutional privilege against self-incrimination. Coercion to waive one's constitutional privilege, by threatening discharge from employment or disbarment from a profession if he refuses to do so, is an abridgment of the privilege. In *Matter of Ellis*, 258 App. Div. 567-568, 572*. Any statute abridging a constitutional right or privilege, or which evades even an implied purpose of the state constitution, is void and of no effect. *People ex rel. Bolton et al. v. Albertson*, 55 N. Y. 50, 55; *Matter of Hopper v. Britt*, 203 N. Y. 144, 149; *People v. Allen*, 301 N. Y. 287, 290. It is unnecessary to consider whether public employment is a right, or a privilege upon which special conditions may be imposed, for a statute may not condition a privilege or the continuance of a privilege upon the relinquishment of a con-

* The references are to Presiding Justice LAZANSKY's dissent. See comment at p. 14 of this brief.

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stitutional right. *Frost v. Railroad Commission*, 271 U. S. 583, 593. Moreover, Article I, Section 6 of the constitution was intended to prohibit enactments similar to Section 903.

Article I, Section 6 of the Constitution of the State of New York states:

"No person shall . . . be compelled . . . to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall . . . be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Particular attention is directed to the proviso permitting the discharge of public officers who refuse *before grand juries* to waive immunity or to answer questions relating to the conduct of their office. Presiding Justice LAZANSKY, referring to it in *Matter of Ellis, supra*, said (258 App. Div. at p. 575):

"It should be noted that the failure to sign a waiver of immunity applies only to testimony of a public officer before a grand jury and concerning the conduct of his office or the performance of official duties. It does not refer to a public officer called to testify before a grand jury concerning the acts of any other persons; *it does not apply in any wise to legislative investigations or to those directed by the Governor or the courts.*" (Emphasis ours.)

Section 903 of the Charter, it will be remembered, provides for dismissal of an officer or civil servant who re-

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fuses to waive immunity or to answer questions in an inquiry before "any legislative committee or any officer, board or body authorized to conduct any hearing."

The express inclusion of the single proviso or exception to the right granted by the Constitution bars any other exception or qualification. That canon of interpretation (New York Statutory Construction Law, Sections 211, 212, 213 and 240) applies with greater force in the construction of constitutional provisions, for the language of the constitution is presumed to be selected with greater care and exactness. RULES OF CONSTITUTIONAL INTERPRETATION, Section 7; *Matter of Wendell v. Lavin*, 246 N. Y. 115; *People ex rel. Gilbert v. Wemple*, 125 N. Y. 485. Under that rule Article I, Section 6 of the Constitution must be held to prohibit the enactment of any law providing for punishment or discharge from office of any person because of refusal to testify on the grounds of self-incrimination, in any inquiry other than the one specified, viz: an inquiry before a grand jury. However, we shall not rest on a rule of interpretation. As shall be shown, it was the stated purpose and intent of those who drafted the aforementioned proviso to Article I, Section 6 of the Constitution to preclude any statutory abridgement of the right against self-incrimination in any inquiry other than one before a grand jury.

Before January 1, 1939, the Article read:

"nor shall he be compelled in any criminal case to be a witness against himself" (Constitution of the State of New York, 1894, Art. I, Section 6).

The proviso was added by an amendment adopted by the Constitutional Convention of 1938, and was approved by vote of the people November 8, 1938, (McKinney, Con-

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stitution of the State of New York, pp. 292-293). The first draft of the proviso submitted to the Convention was very much broader than that finally adopted. At the suggestion of Mr. Justice POLETTI, the penalty therein provided, of removal from office for refusal to testify or waive immunity, was limited to inquiries relating to the official duties of the public officer questioned. New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586. Thereafter the proviso was again amended, on motion of Mr. Justice MARTIN, to further limit its application to officers who refused to testify before a grand jury. Revised Record, vol. III, p. 2588, vol. IV, pp. 2599-2600. That the Convention intended by so limiting the proviso to disallow any further invasion of the constitutional right against self-incrimination is abundantly clear from the following, extracted from the minutes of the Convention:

New York Constitutional Convention 1938, Revised Record, vol. III, p. 2586: . . .

"Mr. Poletti: . . . the committee gave very careful study to this matter. In fact it amended the proposal of Mr. Halpern in several respects: in one respect a very important change, and I think we should note it here. This proposal is directed to public officers, that is, it intends to set them aside and treat them specially, but it deals with public officials only with respect to their official duties. It does not relate to non-official duties. . . ."

p. 2588:

"Mr. Martin: I offer an amendment as follows: on line 6, after the word 'answer' insert 'before a grand jury.' Then a public official is protected; otherwise he is not protected. I have seen investigations when I was district attorney, which were nothing but political, and where they attempted to make

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officials testify before committees, and where those officials were just being bullyragged before the committee. Put him before a grand jury. He has no counsel there and he is protected before the grand jury. . . ."

p. 2589:

"Mr. Martin: . . . Before the grand jury he would be protected. We would not have the newspapers putting in the part of his testimony they liked and leaving out the part that was favorable to him. This will be a general protection to the people and will be a general protection to the public official, and would be in the interest of justice."

p. 2590:

"Mr. Martin: My first amendment is the substantial one. It goes right to the core of the question. Public officials should not be bullyragged by opposing partisans or someone who has a grudge against them, but at the same time they should not be excused; they should go before a grand jury and testify. As far as I am concerned, my amendment is intended to protect the public official, and to assure all that he is not the prey of anybody who has a grudge against him."

p. 2592:

"Mr. Halpern: My objection to Judge Martin's amendment is it prevents the application of this salutary and very important principle to legislative investigations."

.

"Mr. Martin: . . . As the law is today, they are not compelled to answer before anybody, and they are not compelled to testify. We are broadening the law, but in our effort to broaden the law, we should not

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destroy the whole body of criminal law by making a public official take the stand in a case or resign from his office, and *we should protect him the same as we protect every other citizen.*" (Emphasis ours.)

Vol. IV, p. 2597:

"Mr. Martin: If you are going to forfeit the office of every public official who feels that he is being tried before some committee, even before a Governor, for political reasons, then public officers are certainly in a bad position in this State. I think if we limit it right to the grand jury, we will have accomplished justice to all.

p. 2599:

"Mr. Martin: I do not believe in allowing investigation when the investigator will first send for the newspapers, and then when the public official comes in, try to crucify him. No matter whether he is a Republican, a Democrat, or a Communist, it makes no difference to me, I think that public official should be protected the same as any other citizen and should not be abused by these so-called investigations, many of which are going on today throughout this whole country, and are for no other purpose than to annoy the public officials.

I say this amendment would stop all that and protect everyone involved."

It is evident from the foregoing that Article I, Section 6 of the New York constitution was designed to protect public officials as well as all other citizens from loss of office or other punishment because of refusal to testify about political affiliation, before legislative committees. The reasons the constitutional amendment was so drawn are explicitly and forcefully set forth in the quoted statements, and further comment would be unwarranted.

*Appendix B***Conclusion**

Section 903 was here applied to warrant the dismissal of Professor Slochower for refusing to answer questions relating to his political affiliation in 1940 and 1941, in an inquiry conducted by a legislative committee. The section itself did not authorize the action taken. Moreover, Section 903, and the Respondent's application of the section offend the provisions, purpose and spirit of the State Constitution.

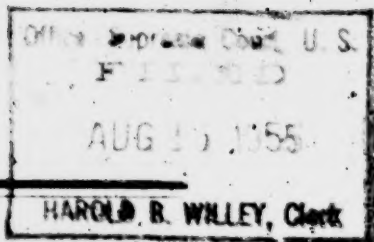
The order dismissing the petition of the appellant Slochower should be reversed, and the prayer of the petition granted.

Respectfully submitted,

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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,

Appellant,

v.

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK.

On Appeal from the Court of Appeals of the
State of New York

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION.
AMICUS CURIAE

OSMOND K. FRAENKEL,
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Union, amicus curiae.*

August, 1955

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HARRY SLOCHOWER,

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THE BOARD OF HIGHER EDUCATION OF THE
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On Appeal from the Court of Appeals of the
State of New York

**BRIEF FOR NEW YORK CIVIL LIBERTIES UNION.
*AMICUS CURIAE***

**Interest of New York Civil Liberties Union as
*Amicus Curiae***

The New York Civil Liberties Union is submitting this brief with the written consent of both parties, filed with the Clerk of this Court. An affiliate of the American Civil Liberties Union, it is a non-partisan organization devoted solely to the protection and advancement of civil liberties in situations arising in New York City and its environs. Its exclusive concern is civil liberties: it has no other platform or program, political, economic, or otherwise.

The New York Civil Liberties Union is interested in the instant case because it believes this Court's reversal of the decision here in issue would erect an important bulwark

against the attack impinging from all sides on the privilege against self-incrimination. We believe that the maintenance of this privilege in its full stature is essential to the dignity and liberty of the individual in his relations with his Government and to his protection from oppression and injustice at the hands of over-eager, but under-conscientious, officials. A provision like the New York City Charter section as here interpreted, offers a ready means for destruction of the value of the privilege for one group of citizens after another.¹

The New York Civil Liberties Union further believes that this Court's invalidation of appellant's discharge and disqualification from employment is important to the preservation of civil liberties because it was in essence bottomed on his suspected associations and beliefs rather than on his professional and classroom competence or performance, and it stemmed from an investigation centering wholly on his expressions of opinion (see R. 30-38). Discharges of teachers from institutions of higher learning on these grounds lead to timid conformity among those who should, for a freely-thinking society, be leading and stimulating consideration of the novel and controversial.²

¹ As to the potential scope of measures imposing disqualifications as the price of exercise of the privilege, consider the bill recently introduced in the California Legislature providing for the revocation of all licenses of business and professional persons licensed under the State Business and Professional Code in the event they exercise the privilege against self-incrimination in any inquiry into Communism or the advocacy of revolution. *Assembly Bill (1955) No. 1903*, introduced by Assemblyman Charles E. Chafel (defeated in Assembly Judiciary Committee, April 19, 1955). A recent New York bill, passed by one house of the Legislature, provided that any employee could be dismissed for invoking the Fifth Amendment in any hearing involving loyalty, notwithstanding the terms of a contract. *New York Times*, March 25, 1955, p. 16.

² Applicable here is Justice Frankfurter's comment on similar measures: "The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public."

And when the questioning concerns, as here, associations and opinions of over a decade ago, a resultant discharge is not only arbitrary to the individual, but means, from the standpoint of free expression, that professors will form and express their opinions under the inhibitory threat that they may have to justify themselves in the indefinite future by an unpredictable standard of rectitude.³

In placing emphasis on the deleterious effect on free expression of appellant's discharge, we are mindful of the fact that there is no basis for believing there is any current danger of "subversion" in the New York colleges; on the contrary, it has been authoritatively asserted that no problem of subversion is present.⁴ The threat to civil liberties from the inhibition of free thought and inquiry is the present peril, and its intensification by the instant discharge contributes to the interest of *amicus*.

service" (*Garner v. Los Angeles Board*, 341 U. S. 716, 728, concurring opinion). And see Justice Douglas: "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect" (*Adler v. Board of Education*, 342 U. S. 485, 510, dissenting opinion).

³ See *Wieman v. Updegraff*, 344 U. S. 183, 191.

⁴ Statement of Harry E. Gideonse, President of Brooklyn College, in program over Radio Station WMCA (Dorothy Duibar Bromley, Moderator), November 24, 1954; and see Report of Commission to Investigate Communism and Un-American Teachings in New Jersey Schools (authorized by New Jersey State Legislature), May, 1953.

POINTS TO BE ARGUED

I. Appellee penalized appellant's exercise of the privilege against self-incrimination guaranteed to him by the Fifth Amendment. Appellee thus violated the protection intended by the Amendment and also the privileges and immunities clause of the Fourteenth Amendment.

II. The discharge of appellant and his permanent disqualification from city employment violated the due process clause of the Fourteenth Amendment.

Summary of Argument

1. The City Charter provision as here interpreted and applied imposes a direct and serious penalty on the exercise of the privilege against self-incrimination guaranteed by the Fifth Amendment for all Federal proceedings. Discharge from employment and permanent disqualification from all city employment as the price of invoking the privilege is a powerful coercion to surrender it and a gross interference with its free exercise. Not only was it the effect of the charter provision, as here interpreted, to force a sacrifice of the privilege and punish its exercise, but this was its very purpose.

The State's imposition of a penalty directly on the invocation of the Fifth Amendment privilege is a violation of the intended protection of the Amendment, for the Amendment could not have been intended to guarantee the privilege in Federal proceedings as against the Federal government, and leave it open to abridgement in such proceedings by the State. In penalizing the exercise of the Fifth Amendment privilege, the State also violated the privileges and immunities clause of the Fourteenth Amendment. Despite the narrowed scope of this clause this Court has repeatedly asserted that it protects those rights guar-

anted to the citizen in relation to the national government by the Constitution. The Fifth Amendment privilege clearly is such a right.

The State's attempt to coerce surrender of the Fifth Amendment privilege by making its waiver a condition of public employment and penalizing its exercise by permanent proscription from public employment, is unconstitutional; the State can not use its power to condition public employment for an unconstitutional purpose. There can be no argument in this case for an exception to this Constitutional principle on the basis of the Government's need for power to conduct its employment relations efficiently, as would a private employer. For here the discharge and disqualification were outside the usual sphere of employment relations. They were not based on questioning by appellee or any agency with authority over appellant's employment. Further, the discharge was not based on any estimate of appellant's fitness, but was imposed purposefully as a punishment to force appellant to surrender his Federal privilege.

II. Appellant's discharge and permanent disqualification from city employment violates due process because it was wholly arbitrary and unreasonable. The question as to his possible membership in the Communist Party prior to 1941, which was the question he refused to answer, had only the most remote bearing on the present status of the Party or the schools, and was entirely inconsequential in view of appellant's willingness to answer questions as to all times since 1941. Furthermore, his discharge and permanent disqualification for this refusal lacked due process because he had no notice that he would be so penalized. Finally, appellant's discharge and disqualification is unreasonable because of the restraint its casts on freedom of association and the cognate freedoms of expression and thought, whose preservation especially in our colleges is an essential foundation of a free thinking society.

ARGUMENT

1. Appellee penalized appellant's exercise of the privilege against self-incrimination guaranteed to him by the Fifth Amendment. Appellee thus violated the protection intended by the Amendment and also the privilege and immunities clause of the Fourteenth Amendment.

Appellant refused to answer a question asked him by a committee of the United States Senate, claiming his privilege against self-incrimination under the Fifth Amendment to the Constitution. This claim was upheld as proper by the committee, and it did not press or coerce him in any way to answer the question (R. 30; 36-37). The highest court of New York, whose decision is here for review, assumed the Constitutional privilege was properly invoked before, and recognized by, the Senate committee (R. 53). It nevertheless held that the New York City charter provision that a city employee shall under certain circumstances be discharged and disqualified from any future elective or appointive city position for invoking the privilege against self-incrimination, applied to appellant (R. 57).

A. Coercive and Penal Effect of City Charter Provision, as Here Interpreted.

It needs no argument to demonstrate that discharge from employment and permanent disqualification from all city employment as the price of invoking the privilege against self-incrimination, is a powerful coercion to surrender it and a gross interference with its free and uninhibited exercise. It is as grave a penalty and as coercive in its effect—indeed, in many circumstances more coercive—than fine and imprisonment. See *American Communications Association v. Douds*, 339 U. S. 382, 402: "Under some circumstances, indirect 'discouragements' undoubtedly have the same co-

ceive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." See also *United States v. Loretto*, 328 U. S. 303, 316; *Cummings v. Missouri*, 4 Wall. 277, 320. To appellant, who was employed in a City College as an Associate Professor of Literature and German and had been a college teacher for 27 years, winning many distinctions in that position, the extent of loss inflicted by the measure is apparent (see R. 34).

Not only is it the effect of the statute to coerce and interfere with the claim of the privilege, but its very intent and purpose is to force surrender of the privilege against self-incrimination, including, under the instant interpretation that guaranteed by the Fifth Amendment. For it can not be argued that this statute looks to determining the fitness of employees as it might be if, for instance, a refusal to answer were treated as one clue or factor in determining the desirability of discharge. Here instead, a refusal to answer is a conclusive reason for discharge, though such a refusal cannot reasonably be deemed to show guilt even in regard to the subject of the question;⁵ and here, moreover, discharge automatically follows a refusal to answer no matter how unimportant the question.

Finally, establishing beyond doubt that the charter section must be deemed a provision for forcing testimony and penalizing a refusal to answer, rather than a measure to eliminate unfit employees, is the provision that the employee is not only to be discharged, but is to be permanently disqualified from all city positions. This provision obviously has no relation at all to the employee's fitness for his present or for any particular position, or to the exigencies of the present or even of a foreseeable situation. See *United States v. Loretto*, 328 U. S. 303; *Bailey v. Richardson*, 182 F. (2d) 46, 54, 55 (C. A. D. C.), sustained by an equally divided court, 341 U. S. 918. In the latter case, where there was a three year bar from government

⁵ See *Quinn v. United States*, 349 U. S. 155, 164, as to error of any assumption of guilt from invocation of the privilege.

service, as compared with the permanent bar in *Lovett*, the court said: "The Court in that case (*Lovett*) clearly held that permanent proscription from Government service is 'punishment' * * *. The difference between permanent and limited proscription is merely one of degree and not one of principal" (at pp. 54-55). In the instant case, the proscription was provided as a punishment for assertion of the privilege, to coerce its surrender, and makes unmistakable that punishment and coercion is the thrust of the section.

B. Intended Protection of the Fifth Amendment.

This interference by the State with the exercise of the Fifth Amendment privilege must be deemed a violation of the protection intended by the Amendment. The Fifth Amendment protects a person from being forced to incriminate himself for a Federal crime in a proceeding by the Federal government.⁶ Here a penalty was directly imposed on exercise of the privilege, in order to force testimony in a Federal proceeding that might be self-incriminating as to a Federal crime. Certainly, the draftsmen did not intend to preserve the privilege in Federal proceedings from Federal, and leave it open to State, abridgement. Compare *United States v. Classic*, 313 U. S. 299, 315; *Terral v. Burke Constr. Co.*, 257 U. S. 529. The Fifth Amendment's grant of privilege is absolute, and can no more be transgressed as it was here by the State than it could be by the United States. See *Quinn v. United States*, 349 U. S. 155, 162: "Coequally with our other constitutional guarantees, the Self-Incrimination Clause must be accorded liberal construction in favor of the right it was intended to secure." *Amble*; *Hoffman v. United States*, 341 U. S. 479, 486. And see *Johnson v. United States*, 318 U. S. 189, 196-197.

⁶ The Fifth Amendment is construed "to confer immunity * * * in any federal inquiry where the information might be useful later to convict of a federal crime" *United States v. Kahriger*, 345 U. S. 22, 34 (Mr. Justice Jackson concurring); *Counselman v. Hitchcock*, 142 U. S. 547, 563.

C. Violation of Privileges and Immunities Clause.

It seems clear that the privilege against self-incrimination insured against the Federal government by the Fifth Amendment, is one of the privileges guaranteed against abridgement by the States by the Fourteenth Amendment. Time after time, despite this Court's narrowing of the scope of the privileges and immunities clause of the Fourteenth Amendment, it has asserted that the rights guaranteed by the Constitution to the citizen in relation to the national government are an essential segment of those privileges. The "privileges and immunities are that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." *Hague v. C.I.O.*, 307 U. S. 496, 519, note 1. (Opinion of Stone, C. J.).⁷ Semble: *Re Kemmler*, 136 U. S. 436, 448; *Twining v. United States*, 211 U. S. 78, 97.) And in the fountainhead case, the *Slaughterhouse Cases*, the Court both made this point and gave examples of the included rights, saying the privileges and immunities protected by the Fourteenth Amendment are those "which owe their existence to the Federal government, its national character, its Constitution, or its laws * * *. The rights to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution" (16 Wall. 36, 79).

The privilege against self-incrimination seems indistinguishable, for purposes of the Fourteenth Amendment, from those referred to in *Slaughterhouse*. It seems equally clear that New York's imposition of a serious penalty directly on the exercise of this privilege was an abridgement of it. Compare *Hague v. C.I.O.*, 307 U. S. at p. 513 (Opinion of Roberts, J.).

⁷ Appellee also violated the principle of Federal supremacy. In punishing appellant for exercising his Federal privilege, which Congress through its committee was according him freely with no threat of redress, the State negated a Federal right and interfered with Congressional performance of the Federal function of pro-

D. Invalidity of Conditioning Employment on Surrender of Privilege.

It is clear, then, that the privilege against self-incrimination in Federal proceedings for a Federal crime was insured to appellant against State coercion, interference, and punishment by the Fifth Amendment (Point B, *supra*) and the Fourteenth Amendment (Point C, *supra*). Here the coercion used by the State to attempt to force surrender of the privilege was the provision that appellant would be deprived of his job and of all City employment if he exercised it; the penalty for its exercise took the form of permanent deprivation of such employment. It is no longer disputable, under the decisions of this Court, that the State can not impose conditions on public employment for an unconstitutional purpose, any more than it can use other forms of coercion and punishment for an unconstitutional end.

As this Court said in *Frost v. Railroad Commission*, 271 U. S. 583, where the State imposed a condition on the grant of a permit to operate as an auto transportation company:

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."

protecting and controlling exercise of a Federal privilege. Compare *Adams v. Maryland*, 347 U. S. 179; *In re Loney*, 134 U. S. 372; cf. *Pacific Coast Dairy Inc. v. Department of Agriculture of California*, 318 U. S. 285, 295. As to the Federal function of protecting a Constitutional right, see *United States v. Classic*, 313 U. S. 299, 314, 315.

And again, in ruling against a condition attached by a State to a foreign corporation's license to do business, this Court said: "The principle * * * is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts * * *. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." (*Terral v. Burke Constr. Co.*, 257 U. S. 529, 532-533.)⁸

It is apparent that the choice the State gave here, between surrender of employment and surrender of a constitutional right may be as coercive as if it imposed "imprisonment, fines, injunctions, or taxes" as the price of exercising the right. See *American Communications Association v. Douds*, 339 U. S. 382, 409. In the *Douds* case, the condition in issue was attached to the privilege of using

⁸ See also *Wheeling Steel Corp. v. Glander*, 327 U. S. 562, 571; *Hanneegan v. Esquire*, 327 U. S. 146, 156; *Marsh v. Alabama*, 326 U. S. 501, 504; *Jamison v. Texas*, 318 U. S. 413, 415; *Mo. ex rel. Gaines v. Canada*, 305 U. S. 337, 349; and see *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 430-1 (Brandeis dissenting), respecting the denial of mailing privileges.

The McAuliffe dictum (quoted by the State court, R. 55) may only have meant, and can be reconciled with the decisions of this Court on the basis, that the conditions in issue appeared to bear a reasonable relation to fitness and efficiency and thus accorded with constitutional standards for such regulations. In any event, compare with *McAuliffe*, Justice Holmes' opinion in *Burleson*, 255 U. S. at p. 437, and see Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938), p. 57, commenting that Mr. Justice Holmes' view in *Burleson* "brushed away this web of unreality" of "treating postal facilities as a privilege."

the facilities of a Federal agency, the National Labor Relations Board. While the condition was upheld, it was upheld only because the regulation met constitutional standards, with full recognition by this Court that the Government was bound by the Constitution when it used conditioning of a privilege as the method of enforcing a regulation. And this Court made clear in *Douglas* that its reasoning was fully applicable to the denial of public employment, and that the Government could not use this lever to curtail the exercise of Constitutional rights. See *Douglas*, 339 U. S. at p. 405, where the Court said, in discussing its preceding *Mitchell* decision, that that "decision was not put upon the grounds that government employment is a privilege to be conferred or withheld at will." See *United Public Workers v. Mitchell*, 330 U. S. 75, 100.

Finally, in *Wieman v. Updegraff*, 344 U. S. 183, 191-192, this Court firmly established that in public employment as in its other exercises of public power, the State is bound by the constitutional guarantees.

In the foregoing cases, the Constitutional right in issue, which the Government could not diminish by conditioning a privilege on its sacrifice, was in effect the right to "reasonable" treatment. In the case at bar, the right the State attempted to curtail by conditioning is more definite and absolute, like the right in the *Terral* case. The right insured by the Fifth Amendment and in turn by the Fourteenth Amendment's privileges and immunities clause is not merely a right to be free from compulsory self-incrimination in Federal proceedings when it seems "reasonable" to be free, but the right to be free from this compulsion regardless of circumstances. Accordingly, there is no question here of whether the State might or might not have had some purported justification for its condition; the Fifth Amendment right of which it sought to deprive appellant is not subject to modification. It was therefore a violation of the Fifth and Fourteenth Amendments for the

State to attempt to deprive appellant of the Federal privilege against self-incrimination by making its surrender a condition of employment."

The argument sometimes heard that there must be a special exception to the usual principles of constitutionality to permit the State to function as efficiently in its employment relations as would a private employer, is entirely inapplicable to this case. For the City charter provision as here applied is entirely outside the usual sphere of employer-employee relations. The question from which appellant's discharge arose was not posed by appellee nor by any agency with any authority over appellant's employment—indeed, the questioning was not by a State agency at all. Further, as already pointed out (*supra*, pp. 7-8), the provision is not directed at appraising the fitness of employees, but is a penalty and coercion for the purpose of adducing evidence for Governmental use either in a Governmental investigation or in a prosecution or both.

⁹ While we submit that the foregoing reasoning is a sufficient ground for reversal of the judgment below, we shall also show that the Charter's condition on public employment as here interpreted and applied had no reasonable justification (*infra*, Point II).

II. The discharge of appellant and his permanent disqualification from city employment violates the due process clause of the Fourteenth Amendment.

Like any arbitrary State act, an arbitrary and unreasonable provision for discharge from public employment violates due process. *Wieman v. Updegraff*, 344 U. S. 183, 191-192; cf. *Mitchell v. United States Public Workers*, 330 U. S. 75. In the case of the City charter provision as here applied, the requirement of reasonableness must be underlined. For, in addition to discharge and the stigma inevitably attached to it because of its connection with an investigation of "subversion",¹⁰ the drastic and extraordinary penalty of permanent disqualification from City employment¹¹ is also imposed.

It is highly unreasonable and arbitrary for New York to attach these penalties to the conduct covered by the City charter, as it was here interpreted and applied. For these penalties are to be imposed, according to the New York court's interpretation, no matter how unimportant the subject matter of the investigation or of the particular question on which answer is refused, and no matter by whom the investigation is conducted or how unrelated to the interests of the State.¹² Under the instant interpretation, though the refusal to answer well may be in no way injurious to the State, the City charter prescribes a flat,

¹⁰ Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 139, 141, 142-3, 160-161, 175-180, 187; *Wieman*, at p. 191; compare *Shurtleff v. United States*, 189 U. S. 311, 317.

¹¹ See *Bailey v. Richardson*, 182 F. 2d 46, 54, 55 (C. A. D. C., sustained) 341 U. S. 918.

¹² If the penalty were attached only to investigations and hearings authorized by the State or City, there might at least be some ground for assuming that they were vital to the State's interest, or even that questions would be propounded with the charter provision in mind to avoid the discharge and disqualification of employees for a refusal to answer questions of little significance to the State.

unvarying, and drastic penalty, that is "wholly disproportioned to the offense."¹³

In appellant's case, the application of the statute is clearly arbitrary. The record shows that he was willing to answer all questions about the present or the decade preceding the hearing, and that he only refused to answer whether he was a member of the Communist Party prior to 1941 (R. 30, 32). The extreme remoteness of this question to the present status of the Party or the schools is clear. Not only is there the obvious time interval,¹⁴ but this Court must know what is generally known and uncontroverted—that membership in the Communist Party in the United States has so diminished and changed in the last decade that information as to Communist activity before 1941 would have at best only scant bearing on present membership. Here the refusal to answer the question was particularly inconsequential in view of appellant's willingness to answer questions as to the present and recent times. Thus, the harshness, vindictiveness, and complete unreasonableness of imposing the penalty of discharge and, in addition, permanent disqualification, on appellant is apparent.

No Evidence of Unfitness.

While, as we have emphasized, the purpose of the charter section is to provide a penalty as a means forcing testimony rather than to set up a standard of fitness for employees, we may note, as further indicating the unreasonableness of the discharge, that it would be impossible to consider appellant unfit because of his refusal to answer. Clearly it cannot be assumed from appellant's refusal to answer

¹³ *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U. S. 63, 66. See *St. Louis, I. Mt. & So. Ry. v. Wynne*, 224 U. S. 354, 359-360. *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 111-112.

¹⁴ Cf. *Bowers v. United States*, 202 F. 2d 447, 449 (C. A. D. C.).

that he was in fact a Communist Party member in 1941.¹⁵ But if, *arguendo*, it were assumed appellant was a Communist Party member in the year about which he declined to answer, an association with the Party that was discontinued in 1941 could not with reason be deemed to show an fitness to teach in 1954, particularly in view of the great possibility that a member at that time had no knowledge of the character of the Party as now perceived.¹⁶ Most especially is this true of a person like appellant who is willing to testify freely as to the subsequent period and whose bona fides can thus be examined.

There was of course no hint or suggestion that appellant has acted immorally, subversively, or incompetently in his position as a German and Literature professor or was other than a noted scholar.

No Warning of Punishment.

The discharge and disqualification are additionally unreasonable because there was no indication or warning that a question on long-past membership in the Communist Party would be deemed a question on "official conduct" within the meaning of the charter (see dissenting opinion in State court, R. 64). Appellant had no basis for assuming the question would be so considered. For there had been, and is, no hint that the suspected membership was in any way connected with appellant's performance as a German and Literature Professor; furthermore, the investigation was being conducted by an arm of the Federal government which

¹⁵ See *Quinn v. United States*, 349 U. S. at p. 164, where the Court speaks of those who "wrongly conceive of it (the privilege) as merely a shield for the guilty."

A person's refusal may be motivated in part by the fear that any information he gives will be used in aid of a prosecution against him though he is in fact guiltless; or that he will be subjected to unjustified perjury charges on the basis of evidence given the committee by informers if he truthfully denies membership; or that he will be forced to give information damaging to others though he believes them innocent.

¹⁶ See *Wickman*, 344 U. S. at p. 190.

presumably was not concerned with local problems (Cf. R. 16-18). In short, appellant had no warning from the vague terms of the charter or the nature of the question that his refusal to answer jeopardized his job. He was therefore subjected to a basic deprivation of due process in that a serious loss was inflicted on him without notice and without opportunity to make the choice of avoiding it.¹⁷

Effect on Freedom of Expression and Association.

Finally, the effect of appellant's discharge on freedom of association must be weighed in the balance in considering the due process guarantee (consider *Wieman*, 344 U. S. at p. 191). Certainly a person's discharge and permanent disqualification on the basis of a refusal to answer as to possible associations over a decade before, casts a serious restraint on freedom of association. Such an after-the-fact penalization is a threat that any non-conformist association may years later become the source of a penalty, and all but clearly conformist associations are discouraged.¹⁸ And freedom of inquiry cannot flourish in our colleges, which should be a major seeding ground for free opinion, if the faculty is afflicted with the timidity borne of discharges such as appellant's, grounded on suspected long-past association and intellectual deviation (see R. 31-38, as to appel-

¹⁷ See *Jordan v. de George*, 341 U. S. 223, 230-231. Cf. *Johnson v. United States*, 318 U. S. 189, 196-197.

¹⁸ Speaking of penalizing past associations that may have been innocent and its effect on freedom of association today, this Court said: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman*, 344 U. S. at p. 191. It acts as a "real deterrent to people contemplating even innocent associations." *Garner v. Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part). The teacher in this situation "will tend to shrink from any association that stirs controversy." *Adler v. Board of Education*, 342 U. S. 485, at p. 509 (Douglas, J., dissenting).

lant's suspected activity.¹⁹ Assuming the State's interest in protecting children in the lower grades from subtle influences towards disapproved viewpoints,²⁰ and assuming sacrifice of a free spirit may be reasonable to there achieve such protection, in institutions of higher learning both the State's interest in protection is the less and the importance of free inquiry is the greater.

¹⁹ Limitation on a teacher's right of association results in "inhibition of freedom of thought, and of action upon thought. * * * Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. * * * It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens. Teachers * * * must be exemplars of open-mindedness and free inquiry." *Wieman*, 344 U. S. at pp. 195-196 (Frankfurter, J., concurring). "Liberty of thought soon shrivels without freedom of expression." *Dennis v. United States*, 341 U. S. 494, 550 (Frankfurter, J., concurring). The rights of assembly and of speech and press are "cognate" (*De Jonge v. Oregon*, 299 U. S. 353, 366) and "inseparable" (*Thomas v. Collins*, 325 U. S. 516, 530-31).

²⁰ See *Adler v. Board of Education*, 342 U. S. 485, concerning the lower grades. This Court has not yet considered the question of the discharge of teachers in institutions of higher learning for their associations and beliefs, except in the *Wieman* case where the discharges were invalidated.

CONCLUSION

The judgment below should be reversed. Section 903 of the New York City Charter was here interpreted as requiring appellant's discharge for exercising his Federal privilege, guaranteed by the Constitution, in a proceeding conducted by an arm of the Federal government, having no connection with or authority over appellant's employment. This interpretation and application of the City charter and appellant's consequent discharge from appellee's employ and disqualification from all New York City employment, should be held unconstitutional.

Respectfully submitted,

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August, 1955

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IN THE
Supreme Court of the United States

OCTOBER TERM—1955

No. 23

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,

Appellee.

On Appeal from Judgment of the Court of Appeals of the
State of New York

PETITION FOR REHEARING

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PETITION FOR REHEARING

*To the Supreme Court of the United States and the Justices
thereof:*

The Board of Higher Education of the City of New York, the appellee herein, by its counsel petitions this Court for an order granting a rehearing of the above-entitled cause and, in support thereof, respectfully shows:

This Court directed that the judgment appealed from herein be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this Court. The majority opinion refers to the proceedings taken on September 24, 1952, before the Internal Security Subcommittee of the Committee on the Judiciary of the United

States Senate at an open hearing held in New York City at which the appellant Harry Slochower appeared pursuant to a subpoena of the Subcommittee. The majority opinion states *inter alia*:

“Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the College; three days later his position was declared vacant ‘pursuant to the provisions of Section 903 of the New York City Charter.’ It appears that neither the Subcommittee nor Slochower was aware that his claim of privilege would *ipso facto* result in his discharge, and would bar him permanently from holding any position either in the city colleges or in the city government.”

The majority opinion herein held that the discharge of appellant Slochower, under the circumstances outlined in the opinion, was a violation of due process. The majority opinion apparently predicated that conclusion in large part upon the asserted fact that “neither the Subcommittee nor Slochower was aware that his claim of privilege would *ipso facto* result in his discharge”. It is submitted that that statement of fact, which appears to be one of the cornerstones of the majority opinion, is not supported by the record. Moreover extrinsic evidence, in the form of public documents and reported court cases, affirmatively indicates the exact opposite of the fact as thus asserted.

If the second sentence of the above-quoted excerpt is intended to mean that neither the Subcommittee nor Slochower was aware of the existence of Section 903 of the New York City Charter, there is nothing in the record to support any such inference. If the second sentence of the above-quoted excerpt is intended to mean that neither the Subcommittee nor Slochower was aware of the legal consequences under Section 903, which would flow from Sloch-

ower's invocation of the privilege against self-incrimination before a Congressional Committee whose inquiry was not specifically directed at "the property, government or affairs of the city or * * * official conduct of any officer or employee of the city", the record does not contain any evidence to support such an inference.

With respect to extrinsic evidence in the form of other court decisions, Section 903, which took effect on January 1, 1938, had been the subject of litigation on at least several occasions long prior to the hearing held by the Subcommittee on September 24, 1952. As pointed out in our main brief herein (p. 24, footnote), prior to Slochower's appearance before the Subcommittee, Section 903 had been held applicable to an employee of the Board of Higher Education who declined to sign a waiver of immunity when subpoenaed to appear at a public hearing of the Joint Legislative Committee to Investigate the Educational System of the State of New York on April 23, 1941. *Matter of Goldway v. Board of Higher Education*, 178 Misc. 1023 (Sup. Ct., New York County; 1942). Incidentally, the appellant Slochower had appeared and testified before the same Joint Legislative Committee at about the same time (Record p. 28).

As also pointed out in our main brief herein (p. 24, footnote), prior to Slochower's appearance before the Subcommittee, Section 903 had been judicially interpreted to apply to an employee of the Board of Education who invoked the Fifth Amendment when questioned by the Committee on Un-American Activities of the House of Representatives concerning membership in the Communist Party. *Matter of Koral v. Board of Education of City of New York*, 197 Misc. 221 (Sup. Ct., New York County, 1950).

The decision in the *Goldway* case in 1942 and the decision in the *Koral* case in 1950 indicated that Section 903 was applicable to employees of both the Board of Education

and the Board of Higher Education; that it applied to investigations conducted either by a committee of the State Legislature or a Congressional Committee; and that questions relating to membership in the Communist Party were within the scope of Section 903 as relating to the official conduct of an employee and the property, government and affairs of the city.

Moreover, the testimony of other witnesses taken before the Subcommittee confirms the fact that both the Subcommittee and the appellant Slochower were aware of the existence of Section 903 of the Charter and the consequences that would flow from the refusal of any witness before the Subcommittee to testify on the ground that such testimony would incriminate him.

On September 9 and September 10, 1952, which was prior to the date when the appellant Slochower testified before the Subcommittee, hearings were held by the Subcommittee in New York City at which it heard testimony of George Timone, a member of the Board of Education of the City of New York and Chairman of the Law Committee of the Board. Mr. Timone called to the attention of the Subcommittee and discussed with its chairman, Senator Ferguson, Section 903 of the New York City Charter. While neither Mr. Timone nor Senator Ferguson referred to Section 903 by its number their discussion obviously related to that section.

The testimony of Mr. Timone before the Subcommittee is annexed hereto as part of the Appendix and made a part hereof. (*Hearings before the Subcommittee to investigate the administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary United States Senate Eighty-second Congress Second Session on Subversive Influence in the Educational Process*, United States Government Printing Office Washington: 1952, part 1, pp. 40-48, 49-51).

The particularly relevant portion of Mr. Timone's testimony given on September 9, 1952, reads as follows (id. p. 41):

"Mr. Timone. * * * Now, here is what the board of education has done, Senator: In February 1941, we dismissed eight teachers. Those teachers were dismissed following a careful investigation by the corporation counsel, following hearings that the corporation counsel, John P. McGrath, himself conducted.

Senator Ferguson: Does this case that I read about in the paper, of requiring city employees or government employees to testify before boards or commissions under a particular charter provision, or ordinance, does that now apply to school teachers?

Mr. Timone. Our view is that it does apply to school teachers, and we always took that view.

And it is comforting to have the court of appeals now definitely say that it does. I think that was an aid to us.

Senator Ferguson. In other words, if a witness refuses to testify before a board of education or a properly qualified board, he can be dismissed?

Mr. Timone. Yes, sir.

Senator Ferguson. That is a cause for discharge?

Mr. Timone. Yes, sir.

Senator Ferguson. Does this apply even though the witness says, 'I refuse to testify on the grounds that it would tend to incriminate me?'

Mr. Timone. Our view is that it does.

Senator Ferguson. In other words, the right of employment is not an absolute right?

Mr. Timone. That is right.

Senator Ferguson. The right to have a public job is not an absolute right, but it is discretionary upon certain conditions, and one of the conditions is that you answer fully any questions that the boards or the various commissions desire to ask?

Mr. Timone.. That is true, Senator.

I think that is the effect, too, of the decision of the United States Supreme Court in March of this year in sustaining the Feinberg order."

On March 11, 1953, which was subsequent to the date of the appellant Slochower's testimony before the Subcommittee, another hearing was held in Washington, D. C. at which the Subcommittee heard testimony of Harry D. Gideonse, president of Brooklyn College, where the appellant Slochower had been employed. Dr. Gideonse referred specifically to Section 903 of the New York City Charter and to the fact that failure to testify in an investigation would result in an automatic discharge under that section. Dr. Gideonse stated that the seven members of the faculty of Brooklyn College who had been called to appear before the Subcommittee had been advised of the effect of Section 903 in the event that they refused to answer questions before the Subcommittee. The name of appellant Slochower was specifically referred to on several occasions during the testimony of Dr. Gideonse, who stated in substance that appellant Slochower, prior to Slochower's appearance before the Subcommittee, had consulted with him.

The testimony of Dr. Gideonse before the committee is annexed hereto as part of the Appendix and made a part hereof (id., part 4, pp. 547-575). The particularly relevant portion of Dr. Gideonse's testimony given on March 11, 1953, reads as follows (id. pp. 548-549):

"Mr. Morris. Will you tell us in general about the work of the seven professors who have been brought down here to appear before the Internal Security Subcommittee? Did you know, for instance, that they were coming down, that they had been subpoenaed?

Dr. Gideonse. Yes, I think I knew it of all, because the staff of this Senate committee has been very care-

ful in preparing and checking with regard to cases of that sort, in part with me and my office.

Mr. Morris. Have you followed the proceedings here? Have you followed the work of the subcommittee?

Dr. Gideonse. Yes, I have followed it quite closely.

Mr. Morris. When you knew that a particular professor or member of the faculty from your university appeared, did you send for a transcript of the hearings?

Dr. Gideonse. That is right.

Mr. Morris. I wonder if you would tell the committee what steps you have taken when you have come to know that a particular member of your faculty has invoked his privilege against incrimination before this Internal Security Subcommittee?

Dr. Gideonse. The question is a very broad one. I would like to go into the background a little.

In general, of course, the suspending of a teacher under the State tenure law in New York State requires all the provisions of the State tenure law and of the bylaws of the board of higher education. That means that there have to be specific charges, trial committees, and so on. But these particular cases are special because they fall under the charter of the city of New York, article 903, which for a long time now—I think the first case of of that sort goes back to 1941, as far as the board of higher education is concerned—has been held to mean in court interpretation that a witness who, as an officer of the city of New York, pleads self-incrimination as an excuse for not answering questions about what he does in his official capacity, has automatically by that very plea, as he spoke those words, discharged himself. In other words, that clause has been held to be self-executing. So all that happens under that particular provision is that after a survey

of the transcript has made it clear that that is the kind of testimony that really was given, that testimony is recognized as a fact that took place in the light of the prevailing law.

In other words, the dismissal is really recognized as having taken place when the testimony was offered; and all these men knew that, because they had all been warned of that before they went down."

Appellant Slochower and Section 903 were referred to on several other occasions in the course of Dr. Gideonse's testimony (see *id.*, pp. 552-554).

Dr. Gideonse's testimony continued as follows (*id.*, pp. 560-561):

"Senator Smith. Have you suspended or did you suspend all the members of your faculty who refused to answer the questions of the committee?

Dr. Gideonse. I believe in every single case we did that, Senator.

Mr. Morris. The seven faculty members who have appeared here are Harry Slochower, Sara Riedman, Melba Phillips, Frederick Ewen, Murray Young, Elton Gustafson, and Joseph Bressler. They are the seven members of your faculty who have appeared before this Internal Security Subcommittee.

Dr. Gideonse. Yes, sir * * *

Mr. Morris. Doctor, what I was trying to bring out was, have they in fact denied to you being members of the Communist Party?

Dr. Gideonse. Yes, several of those people have.

Mr. Morris. And yet when they appear before a properly constituted tribunal such as this Senate Internal Security Subcommittee, they have invoked their

privilege under the fifth amendment rather than put a denial on the record.

Dr. Gideonse. I can tell you about one of these colleagues in some detail.

Mr. Morris. Will you do that, please?

Dr. Gideonse. He was a gentlemen that I thought probably had an affiliation in terms of what we knew about him in the Rapp-Coudert days, and a faculty committee also had some suspicion about this. He was a good scholar, and with his students an effective teacher.

The time came when he was ready for promotion in terms of a comparison with other colleagues. Of course, the issue arose, since you can't prove these doubts, should we not waive them? Which is truly a very effective argument, and certainly in line with the old American tradition that you must be proved innocent until—et cetera. So a faculty committee was set up to look into the merits of the case, and in that case the faculty committee did a very thorough job for a faculty committee that cannot do an investigation of the FBI sort. They came to the conclusion, after much heart-searching, that this story about this man was probably untrue, but they had these doubts. So they made him write out, with his signature under it, very solemnly, all the things that he had told the committee about never having been and not now being a member of the party, and that was signed.

Then he was called a couple of years later—and we promoted him, by the way.

Mr. Morris. Are you going to name this man for us?

Dr. Gideonse. Yes. You have him.

Mr. Morris. Which one is that?

Dr. Gideonse. That is Professor Slochower.

When this particular gentleman was called, he came in to get advice from me, and I told him, 'I don't see

that you have a problem. You have told the faculty committee and you have told me that you were not and never have been. We have that from you in writing. You assured all your colleagues. You have led them all to believe that. All you have to do is go and tell that committee just exactly what you have told us and what we have in writing from you.'

His reply to me was, 'If I do that there, they will prove perjury on me.'

That gives you a picture of the kind of morale that we are dealing with. These are not issues that are worthy of being considered by anyone who is really professionally interested in academic freedom. This is the academic gutter."

WHEREFORE upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the judgment of this Court reversing the order of the Court of Appeals of the State of New York be vacated and that the aforesaid order of the Court of Appeals be, upon further consideration, affirmed.

May 2, 1956

Respectfully submitted,

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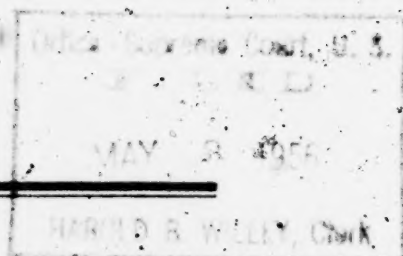
ROBERT E. HUGH,

of Counsel.

Certificate of Counsel

I, PETER CAMPBELL BROWN, counsel for the above-named appellee, the Board of Higher Education of the City of New York, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and is in my opinion well-founded in law and in fact and proper to be filed herein.

PETER CAMPBELL BROWN,
Counsel for Appellee.



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APPENDIX A

HEARINGS

BEFORE THE

SUBCOMMITTEE TO INVESTIGATE THE
ADMINISTRATION OF THE INTERNAL SECURITY
ACT AND OTHER INTERNAL SECURITY LAWS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

~~Eighty~~-SECOND CONGRESS
SECOND SESSION

ON

SUBVERSIVE INFLUENCE IN THE EDUCATIONAL PROCESS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1952

TUESDAY, SEPTEMBER 9, 1952

UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE
INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY
LAWS OF THE COMMITTEE ON THE JUDICIARY,

New York, N. Y.

The subcommittee met at 10:30 a.m., pursuant to recess, in Room 1305, United States District Court Building, Foley Square, the Honorable Homer Ferguson presiding.

Present: Senator Ferguson.

Also present: Robert Morris, subcommittee counsel, and Benjamin Mandel, director of research.

(40)* TESTIMONY OF GEORGE A. TIMONE, CHAIRMAN, LAW
COMMITTEE, BOARD OF EDUCATION, NEW YORK CITY

Senator Ferguson: Will you raise your right hand, please?

You do solemnly swear, in the matter now pending before this subcommittee of the Judiciary Committee of the United States Senate, that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Timone. I do.

Senator Ferguson. State your full name and address?

Mr. Timone. My name is George A. Timone. My address is 250 Riverside Drive, and I have been, since 1946, a member of the Board of Education of the City of New York.

I do not have a prepared statement on the advice of the corporation counsel, but at the request of our president and for myself, I would like to make a very brief statement on behalf of the board.

Senator Ferguson. We would like to hear from you just as fully as you desire.

Mr. Timone. It is the view of our board that we are indebted to the committee and to you, Senator, and to Dr. Dodd, for what we count to be a great public service.

Now, as to the reason for this statement, Dr. Dodd has testified that there are probably 750 teachers in the metropolitan area who, at least as of 1944, were Communists. I suppose that a lesser number of that would be in the public-school system.

Mr. Morris. That is right. Dr. Dodd was very clear to testify that that number did not involve only people who are in the public-school system. She did stress that it was private schools and private colleges also,

* All figures in parentheses indicate the number of each new page of the Hearings, Parts 1-14, in the "Committee on the Judiciary 82nd, 83rd and 84th Congress—Internal Security—Subversion Influence in the Educational Process."

Senator Ferguson. In the educational system.

Mr. Timone. That is true.

(41) Well, even if you should take 500 as a figure in our public-school system, let me say, in the first place, that is 500 too many.

At the same time, it should be said that there are 38,000 teachers in our public-school system. So that, percentage-wise, we must not let the impression go out that any substantial percentage of our teachers ever belonged to the Communist Party or were ever in the Teachers Union, for that matter.

The Teachers Union, parenthetically, is one of 68 different organizations that we have, Senator, in our public-school system. We have over 700 schools.

I know you have a large organization in Michigan and Detroit, and I think this is much larger.

Now, here is what the board of education has done, Senator: In February 1941, we dismissed eight teachers. Those teachers were dismissed following a careful investigation by the corporation counsel, following hearings that the corporation counsel, John P. McGrath, himself conducted.

Senator Ferguson: Does this case that I read about in the paper, of requiring city employees or government employees to testify before boards or commissions under a particular charter provision or ordinance, does that now apply to school teachers?

Mr. Timone. Our view is that it does apply to school teachers, and we always took that view.

And it is comforting to have the court of appeals now definitely say that it does. I think that was an aid to us.

Senator Ferguson. In other words, if a witness refuses to testify before a board of education or a properly qualified board, he can be dismissed?

Mr. Timone. Yes, sir.

Senator Ferguson. That is a cause for discharge?

Mr. Timone. Yes, sir.

Senator Ferguson. Does this apply even though the witness says, "I refuse to testify on the grounds that it would tend to incriminate me?"

Mr. Timone. Our view is that it does.

Senator Ferguson. In other words, the right of employment is not an absolute right?

Mr. Timone. That is right.

Senator Ferguson. The right to have a public job is not an absolute right, but it is discretionary upon certain conditions, and one of the conditions is that you answer fully any questions that the boards or the various commissions desire to ask?

Mr. Timone. That is true, Senator.

I think that is the effect, too, of the decision of the United States Supreme Court in March of this year in sustaining the Feinberg order.

Senator Ferguson. That is itself not an absolute right, but it is a qualified public right.

Mr. Timone. Public employment and especially public employment as a school teacher.

I can well understand that one might be reluctant in dismissing a person in the sanitation department under certain conditions where, if those same conditions obtained and the person were a school teacher, (42) we would take a different view, because the opportunity for mischief by a school teacher is much greater, in our view, than the opportunity for mischief by a sanitation-department employee.

Senator Ferguson. All right, now you may proceed.

Mr. Timone. So that at those hearings that resulted ultimately in the dismissal of those eight teachers, we had engaged the services of Theodore Kiendl, who is probably one of the outstanding trial lawyers of this country, a partner in the John W. Davis firm. He submitted a report to us. We adopted that report and we dismissed those teachers.

Seven of those eight were dismissed because they re-

refused to answer the question: "Are you now, or have you been, a member of the Communist Party". One was dismissed because we alleged and proved that he was a member of the Communist Party.

Let me assure you that as to those dismissed because they refused to answer the question, that we had some information—and pretty reliable information—that the people involved were members of the Communist Party.

But we desired one test case. We felt that we owed it to education and to the city to present at least one test case where we squarely charged and proved membership in the Communist Party.

Now, an appeal is pending from the first case. That appeal has been pending in the appellate division of the second department, for a year and a half. It has not been pressed.

Senator Ferguson. When it has not been pressed, would you elaborate on that?

Mr. Timone. Yes. That counsel for the Teachers' Union—and it is not essential that they represent the eight individuals who were dismissed in February 1951—started a proceeding under article 78 for a review of our decision. That comes before the appellate division in the second department, which is in Brooklyn. Their record has not been printed and their appeal has not been pressed.

In other words, they took an appeal, which has been pending for almost a year and a half, and they have not pressed it.

Senator Ferguson. Does that stay your proceeding of the discharge of the employees?

Mr. Timone. That does not stay it, but something else stays it that I will come to in just a moment, Senator.

Senator Ferguson. All right.

Mr. Morris. When you say it stays it, Mr. Timone, does that mean that there is no further prosecution of this problem in the meantime?

Mr. Timone. I mean that we have been stayed, but we have not been stayed by the appellate division, second department. We have been stayed in another forum and for another reason.

If you wish me to come to that now, or later—

Senator Ferguson. No. Take it up later.

Mr. Timone. Very well. I will take it up chronologically and I will make it brief.

Senator Ferguson. Yes.

Mr. Timone. We then went to the corporation counsel and we asked him to assign his top man to work full time for the board of education as our counsel in investigating and prosecuting similar cases. He did so assign an extraordinarily capable and experienced attorney, Saul (43) Moskoff, who is directing our investigation into this problem, devoting his time exclusively to that, and we have given him a staff.

And just parenthetically, Mr. Moskoff has been subjected, as the president of our board has been, as our superintendent of schools has been, and as I have been, to the full treatment of smears that Dr. Dodd has made allusion to. These smears consist generally in circulars and dodgers that are distributed on street corners charging us with being Fascists, charging us with conducting this investigation only to sidetrack the terrible conditions existing in our schools and so forth. We have become accustomed to that.

Senator Ferguson. You must be able to endure that. This committee, I think, in this morning's press, in a statement from the union, was described as Fascist in a similar way.

Mr. Timone. We have been receiving that for quite some years, Senator.

Now, might I make reference to another point that Dr. Dodd has mentioned? She was concerned about people who had been duped into the Communist Party and sincerely have gotten out. But I say that that problem is not new

with us. We have had a number of cases where a teacher has come in and has said, "Yes, I was a member of the Communist Party." And they give us the time and the teacher then says that he got out. And where his subsequent conduct and activity has not been inconsistent with that resignation, we have accepted it.

It is the policy of the superintendent and of the board not to bring charges against those teachers where we believe that they are sincere in their change. And there have been a number of cases precisely along that point.

Of course, however, if a teacher should receive from Mr. Moskoff a notice to come in and be questioned, let's say, in September 1952, and 3 days after the teacher receives the notice he then resigns from the Communist Party, we would be a little naive and gullible if we thought that that were a sincere repentance, a sincere change. We are not swallowing that kind of a resignation.

Now, we have had a number, a dozen or more, resignations from teachers who have been called in for questioning and who rather than submit to questioning have resigned.

Senator Ferguson. We find that under the loyalty program in the various departments of Government, that rather than be subjected to telling the truth, they would rather resign.

Mr. Timone. Yes. We find that.

Mr. Morris. Therefore, Mr. Timone, it is the position of the board of education that if some teacher who you have evidence was associated with the Communist Party in the past comes forward and cooperates completely with you, even to the extent of making known details of that person's activity in the Communist Party, that there is no disciplinary action against such a person?

Mr. Timone. That is true.

Every case, of course, is judged individually. We must reach a conclusion as to the sincerity of the resignation.

There can be such a thing as a strategic or tactical resignation at certain times, and if it is that kind of a resignation, charges would be brought. If it is a sincere resignation, charges would not be brought.

So that any teacher who, for some period of time, has been in the (44) Communist Party and has gotten out and is sincere about it, I think need have no real fear of any action that the board of education would take.

Mr. Morris. And is the reason for that the fact that you are more interested in finding out what the present truth and present reality is than punishing for some past wrongdoing?

Mr. Timone. What we are interested in is this: We are interested in protecting school children, who are our first concern, against the damage that can be done and that we feel inevitably will be done by a Communist teacher. That is the point of focus rather than any effort to punish somebody for past deeds.

Senator Ferguson. You realize the real question of the training of the youth, and if they are to be trained by actual Communists, you believe that that is such a detriment that that is the first evil that has to be cured?

Mr. Timone. Senator, not only do I believe that intensely, but let me assure you every member of our board does, and the superintendent of schools does. And that is the policy of the board and we are very conscious of that and very sensitive about our responsibilities on that score.

Senator Ferguson. And you believe, as a board, that on this question of the education, youth can be contaminated and the minds of the youth can be enslaved even on into the future through the Communist teacher; is that correct?

Mr. Timone. It is correct, sir.

Senator, might I say that the board—as I said, Mr. Moskoff and the staff have been devoting full time for well over a year now to this work—this board adopted, in the

spring, a statement of policy. I would like to offer that in evidence, but in two words or sentences, here is what our statement of policy does:

It says, No. 1, it is our right and our duty to dismiss Communist teachers, and, No. 2, as a corollary to that, the superintendent has the right to ask a teacher, where he has good reason to ask the question, "Are you now, or have you been, a member of the Communist Party?"

That is all our statement of policy says. And we give the factual background and the court decisions to support those conclusions.

Following the adoption of that statement of policy, the superintendent brought charges against eight additional teachers, and it is just a coincidence that eight are involved here, too. They were all charged with refusing to answer the \$64 question, and they were suspended.

The Teachers' Union took an appeal to the State commissioner of education. That was argued in March of 1952.

You see, appeals may be taken from decisions of our boards of education even to the State commissioner of education, or to the courts.

Now, here in April 1952, upon the argument, we were stayed from proceeding further pending a decision.

Senator Ferguson, Did the State commissioner stay you?

Mr. Timone. By the State education department; technically, at least, by the State commissioner of education.

And we have thus been stayed in three areas. We have been stayed No. 1, from conducting the hearings on the eight teachers already suspended, and Col. Arthur Leavitt a member of our board, together with (45) Rev. D. Coleman, are the two trial examiners appointed by our board to conduct those hearings.

Although they were appointed in March, they have not yet conducted any hearings because of the stay.

That is one area in which we have been stayed.

Secondly, we have been stayed in suspending any other teachers who have refused to answer whether they are or are not members of the Communist Party, and there are several such cases, a number of such cases, that the superintendent would suspend tomorrow except for the stay.

Then, Mr. Moskoff has been stayed, we have been stayed from asking any additional teachers "Are you now, or have you ever been a member of the Communist Party?"

So while I don't wish to be understood to criticize the State commissioner of education, who personally is a very capable and a very fine person, really the effect of this stay since last April has brought comparatively to a standstill our efforts in weeding out Communists and subversives from our school system.

We are hopeful, very hopeful, that even if we cannot get a decision on the subject matter of the appeal very shortly, that we can get very shortly a complete lifting of this stay so that we can proceed as we want to proceed.

Mr. Morris. Does that mean, Mr. Timone, that, for instance, in connection with the 10 teachers whom we have summoned here to testify here tomorrow, does that mean that you are not now in a position to call these teachers in to ask them whether or not they have been members of the Communist Party?

Mr. Timone. That is what that means. You can ask the question, but apparently we cannot without violating this formal stay.

Mr. Morris. And that is the situation as it exists today?

Mr. Timone. That is as it exists this moment.

I know how the State commissioner individually feels about Communist teachers. I am therefore hopeful that we will get relief very soon.

Senator Ferguson. Has he written an opinion in granting the stay?

Mr. Timone. It is a so-called informal stay. We were told what the stay was, and we said that a formal stay

would be issued if we did not abide or agree to abide by the informal stay, and we respectfully suggested to him that if he shall not see fit immediately to lift this informal stay, that he please make it a formal stay so that we could all know more definitely possibly what we may and what we may not do.

Senator Ferguson. You indicated that there are moves made to criticize and even smear the board of education and those connected with this activity against communism in your schools.

Mr. Timone. Oh, yes, Senator.

Senator Ferguson. Is there any cooperation and praise of your conduct?

Mr. Timone. I think the press generally, apart from the Communists and apart from the circulars being distributed along the streets, and apart from the Teacher News, which is the publication of the Teachers' Union I think there has been a recognition by the press of what we have been doing and what we have been trying to do.

(46) Senator Ferguson. I thought I would ask that because the record may indicate that there is only one side, that everything was going one way.

Now, what about the average teacher in the union? Is it the union, as officials, or is it the union, as members, that are violently opposing your action?

M. Timone. Senator, that is a \$64 question, too.

Let me say this: Dr. Dodd has described how, in 1935, a large group came out of the union. Now, since 1935, this union has been, must I say, expelled, or may I say kicked out—it has been kicked out of the American Federation of Teachers, has been kicked out of the Central Trades and Labor Council, has been kicked out, as of 1951, out of the CIO, has been kicked out of the Joint Committee of Teacher Organizations because of its following the Communist Party line:

As recently as last year, the CIO found, after hearings when they expelled the parent organization, of which this is an integral part, they said that it was an instrument of the Communist Party.

Now, this public criticism has been going on now since 1935. The number of people in the Teachers' Union has been diminishing.

Senator Ferguson. Do you have that number?

Mr. Timone. From time to time, they give the number.

Senator Ferguson. Do you know what it is now?

Mr. Timone. No; I don't. I know that some time ago they claimed approximately 3,200, but, Senator, you cannot rely on information you get from that source, as we found out.

Senator Ferguson. Was 3,200 your last figure?

Mr. Timone. Yes. A number of years ago approximately 3,200. But that includes not only teachers working for the board of education, that is to say, at the elementary, junior high school and high-school level, but it includes teachers in private schools and it includes college teachers, and we have no jurisdiction over colleges.

Mr. Morris. Who was the person, Mr. Timone, in that Teachers' Union, who would be responsible to this committee to give the precise membership of that union if this committee should want that?

Mr. Timone. Well, the president.

Mr. Morris. Who was the president?

Mr. Timone. Abraham Lederman. But he is one of the eight teachers we dismissed in February 1951 because he wouldn't answer the question.

But coming back to the original point: Undoubtedly there are some teachers still in the Teachers' Union who do not know, or do not appreciate its aims and purposes, who are in there just because of gullibility.

But, really, how many such can there be? How gullible can a person become?

Senator Ferguson. And how long?

Mr. Timone. And for how long.

So that it is fair to say that a substantial percentage of teachers now in the union are in there knowing its purposes. I don't see how except a comparatively few could be in there all this time and with all of these exposures and not know its purposes. I think that is carrying charity to the point where it is completely unrealistic.

(47) Senator Ferguson. Do you believe, then, at the present time, that this teachers' union is dominated by the Communists?

Mr. Timone. Oh, completely.

Senator Ferguson. Controlled, in other words, rather than dominated; is that right?

Mr. Timone. Yes, controlled.

You know parenthetically, the eight teachers that we dismissed in February 1951, all eight were officers or members of the executive committee of the Teachers' Union. And of those now under suspension, whom we have not tried because of the stay, I believe that all eight are either members of the executive committee or active members of the Teachers' Union.

And all those who are now being called for questioning, but who do not appear because of the stay, all retain the counsel for the Teachers' Union to represent them.

Might I say, Senator, we talk about getting Communist teachers out of our system, and we have a duty in that regard. It mustn't be felt that the board of education thinks that it completely discharges its problem when we discharge Communist teachers. That is essentially a negative action—an important negative action, but still negative.

We have inaugurated a program and we have a regular monthly publication that we call Strengthening Democracy, which gives all our teachers source material in exposing

totalitarianism, in giving them references, in giving them material so that affirmatively they can strengthen democracy and teach democracy to our children.

That is democracy as you and I here understand it, not democracy as it has been called so glibly by the Teachers' Union.

So that we have a definite, affirmative program to teach our children about communism. That is much, much different, obviously, from teaching our children communism or from permitting them to be taught about communism by Communist teachers. But we think they should learn about communism, and we have a definite program so to do.

But, in the final sentences, Senator, there are probably more things that we can do, but I didn't wish the impression to get about—and I am not disputing Dr. Dodd, I believe her statement implicitly—but you see so many Communist teachers in our system, and did I not wish anybody to feel that the board of education was not doing all that it could to cope with the problem.

Senator Ferguson. But you have, at the present moment, a limitation, as you say, on what you believe you should be doing?

Mr. Timone. A very definite limitation.

Mr. Morris. And you, too, are aware of Dr. Dodd's testimony to the effect that if three teachers are on a faculty, that they constitute a very formidable unit with respect to spreading Communist purposes in the school?

Mr. Timone. I believe that implicitly.

Senator Ferguson. Do you have any other questions, Mr. Morris?

Mr. Morris. Mr. Chairman, we have had several requests of individuals in organizations to give testimony here on this point. Consistent with the express policy of the committee, I think we should do that in executive session and let the next public testimony be when these teachers whom we have named testify tomorrow afternoon.

(48) Senator Ferguson. Yes, unless the committee comes to the conclusion that at the close of the executive testimony it should be open to the public and taken in public.

Mr. Morris. That is right.

Senator Ferguson. Then we would feel at liberty to open the hearings.

Mr. Morris. That is right, Senator.

Senator Ferguson. I want to thank you for coming in and telling us what the problem is, as you see it as a member of the board of education, Mr. Timone.

Mr. Timone. Thank you, Senator.

Senator Ferguson. We did not feel, as I said, that we were coming here to interfere with your activities as a member of that board. We believe that education is a local problem except that it might affect our national security. Then it becomes a national problem. We want to allow everything that is possible at the local level. We appreciate your coming in.

Mr. Timone. Far from interfering, we think you help our efforts.

Thank you, sir.

Senator Ferguson. We will recess the open hearings until 2 o'clock tomorrow, and if the committee desires to open any hearing at any particular time after hearing the executive, we will do so.

(Thereupon, at 11:45 a. m., a recess was taken, the hearing to reconvene at 2 p. m., Wednesday, September 10, 1952).

(49) WEDNESDAY, SEPTEMBER 10, 1952

UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE
INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY
LAWS OF THE COMMITTEE ON THE JUDICIARY,

New York, N. Y.

The subcommittee met at 2:15 p. m., pursuant to call, in room 1305, United States District Court Building, Foley Square, Hon. Homer Ferguson presiding.

Present: Senator Ferguson.

Present also: Robert Morris, subcommittee counsel, and Benjamin Mandel, director of research.

Senator Ferguson. The committee will come to order.

Mr. Morris. Mr. Chairman, Mr. George Timone, chairman of the New York City Board of Education, has requested an opportunity to appear here for a very short time at the beginning of this session.

Senator Ferguson. He may take the stand and continue his examination.

Mr. Timone. Thank you, Senator. I think I can do this in about 2 minutes.

Senator Ferguson. All right, sir.

FURTHER TESTIMONY OF GEORGE TIMONE, CHAIRMAN, LAW
COMMITTEE, BOARD OF EDUCATION, NEW YORK CITY

Mr. Timone. Senator, I testified yesterday that we had been stayed from certain action by the State department of education for approximately 6 months from taking certain action.

May I supplement that testimony by now saying that I completed my testimony at approximately 11:45 a. m. yesterday. At 12:15 p. m. yesterday, that is, a half hour later,

a letter signed by the State commissioner of education and addressed to Michael A. Castaldi, assistant corporation counsel, was read over the telephone to Mr. Castaldi. That letter was transcribed in the corporation counsel's office and delivered to Mr. Castaldi at 12:45 p. m.

The original letter, postmarked in Albany, September 8, actually reached the corporation counsel's office at 5 minutes after 2 p. m. yesterday.

Senator Ferguson. Could I see the original?

Mr. Timone. Yes. Here is the original, sir.

(50) The effect of the original is to vacate the stay. You might recall I had testified that I was hopeful that at an early date the State department of education would vacate and lift the stay that had been imposed upon us.

Senator Ferguson. In other words, this letter appears to have been mailed in Albany, September 8, at 1:30 p. m.

Mr. Timone. Yes, sir. It reached the corporation counsel at 5 minutes after 2 yesterday.

Senator Ferguson. Would you read it into the record?

Mr. Timone. I would be very glad to, sir:

Re: Appeals of Irving Adler, Dorothy Block, et al., from certain actions, etc., of Board of Education of the City of New York.

My Dear Mr. Castaldi: I have given further consideration to the matter which you presented to me in my office this afternoon.

When the above-entitled case was argued, it was understood that while no formal stay would be issued, I requested your office to advise the board of education not to pursue further the questioning of employees as to whether they are members of the Communist Party, pending a determination in said case. Since that time I have given consideration to that case and have concluded that substantial issues which may affect my decision in this case were

presented in a proceeding which was commended prior to the proceeding before me, to the appellate division for decision, and that my decision should await that determination.

I further understand that the appeal has not been argued and that it is not on the calendar of your appellate division for the September term. Under the circumstances I have concluded not to grant a formal stay in the proceeding and to release you from the understanding had at the time of the hearing in respect thereto. In so doing, however, I want it clearly understood that this does not represent in any way my determination on the issues of the above-entitled case. The question before me specifically in that case is whether your board of education may properly inquire of its teachers whether they are members of the Communist Party and, if they refuse to answer, to dismiss or suspend them. This letter is not to be construed in any way as a determination of that issue, nor does it affect our understanding as to the petitioners in the above-entitled appeals.

Yours very truly,

L. A. WILSON.

Copy to Witt and Cammer, and copy to Melton H. Friedman, Esq.

Mr. Morris. Mr. Chairman, will that be received into the record?

Senator Ferguson. Yes, sir.

(The letter previously read by the witness was received as exhibit No. 1.)

Mr. Morris. Thank you, Mr. Timone.

Senator Ferguson. I might ask, Mr. Timone, whether or not the board or you consider that this is a release of any

stay and that you might proceed as you^s deem, advisable?

Mr. Timone. I so interpret that letter, Senator, as a complete release from any stay, and we expect to proceed promptly, very promptly.

Mr. Morris. Mr. Timone, do you plan to attend this session today?

Mr. Timone. For a few moments; at most, unless you wish me to.

Mr. Morris. Would you have someone who would represent you or the board observe the questions that will be directed to the witnesses today?

Mr. Timone. Yes.

Mr. Morris. And then we would like to determine the extent to which you are empowered to go into questions such as will be asked here today.

Mr. Timone. Thank you.

(51) Mr. Morris. Mr. Chairman, the first witness I would like to have called today will be Henry F. Mins, Jr.

WEDNESDAY, MARCH 11, 1953

UNITED STATES SENATE
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE
INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY
LAWS OF THE COMMITTEE ON THE JUDICIARY,

Washington, D. C.

The subcommittee met at 2 p. m., pursuant to recess, in room 318 of the Senate Office Building, Senator William E. Jenner (chairman of the subcommittee) presiding.

Present: Senators Jenner, Watkins, Hendrickson, Welker, McCarran, Smith, and Johnston.

Present also: Robert Morris, subcommittee counsel; and Benjamin Mandel, director of research.

The Chairman. The committee will come to order.

Dr. Gideonse will you stand up and be sworn to testify?

Do you swear the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. Gideonse. I do.

The Chairman. You may be seated.

TESTIMONY OF HARRY D. GIDEONSE, PRESIDENT OF BROOKLYN
COLLEGE, NEW YORK CITY, N. Y.

The Chairman. Will you state your full name to the committee?

Dr. Gideonse. Harry D. Gideonse.

The Chairman. What is your profession?

Dr. Gideonse. President of Brooklyn College of the city of New York.

The Chairman. Where do you reside?

Dr. Gideonse. In Great Neck, Long Island.

The Chairman. Mr. Morris, you may proceed with your questions.

Mr. Morris. Dr. Gideonse, what do you do at the present time?

Dr. Gideonse. I didn't get that question.

Mr. Morris. What is your present occupation, Dr. Gideonse?

Dr. Gideonse. President of Brooklyn College.

Mr. Morris. For how long have you been president of Brooklyn College?

Dr. Gideonse. Almost 14 years.

Mr. Morris. Could you give us a short sketch of your educational background? In other words, let us know what degrees you have, from what universities you obtained those degrees, and generally qualify yourself as an authority in the field of education.

(548) Dr. Gideonse. I did my undergraduate work at Columbia, and my graduate work there as well as at the University of Geneva, Switzerland.

I taught in Barnard College, Columbia College, and then after my graduate work was finished, at Rutgers University, the University of Chicago, and I was a professor of economics and chairman of the department of economics and sociology at Barnard College when I was appointed, in 1939, president of Brooklyn College.

Mr. Morris. I see. What degrees do you hold, Dr. Gideonse?

Dr. Gideonse. B. S. and M. A. from Columbia; a degree known as *Diplome des Hautes Etudes Internationales*, from the University of Geneva. That was the thesis degree, and a number of honorary degrees if you are interested in them.

Mr. Morris. I see.

Have you been engaged in generalized educational activities outside your position as president of Brooklyn College in the last 14 years? Will you give us a brief sketch of what you have done?

Dr. Gideonse. I have been very much concerned about civil rights, and I am chairman of the board of the Woodrow Wilson Foundation, or have been. I have in a civil-rights capacity been chairman of the board of the Willkie Memorial Building, which is the headquarters, of course, of a large number of those agencies. In that capacity, I suppose I am something like the landlord.

I have been an officer and a founder of Freedom House. I have been chairman of a number of committees, one on liberal education of the Association of American Colleges. I suppose that answers your question.

Mr. Morris. Yes. You also are the president of Brooklyn College, from which university seven members of the faculty have been called to appear before this Internal Security Subcommittee, is that right, Doctor?

Dr. Gideonse. Yes, sir.

Mr. Morris. Will you tell us in general about the work of the seven professors who have been brought down here to appear before the Internal Security Subcommittee? Did you know, for instance, that they were coming down, that they had been subpoenaed?

Dr. Gideonse. Yes, I think I knew it of all, because the staff of this Senate committee has been very careful in preparing and checking with regard to cases of that sort, in part with me and my office.

Mr. Morris. Have you followed the proceedings here? Have you followed the work of the subcommittee?

Dr. Gideonse. Yes, I have followed it quite closely.

Mr. Morris. When you knew that a particular professor or member of the faculty from your university appeared, did you send for a transcript of the hearings?

Dr. Gideonse. That is right.

Mr. Morris. I wonder if you would tell the committee what steps you have taken when you have come to know that a particular member of your faculty has invoked his privilege against incrimination before this Internal Security Subcommittee?

Dr. Gideonse. The question is a very broad one. I would like to go into the background a little.

(549) In general, of course, the suspending of a teacher under the State tenure law in New York State requires all the provisions of the State tenure law and of the by-laws of the board of higher education. That means that there have to be specific charges, trial committees, and so on. But these particular cases are special because they fall under the charter of the city of New York, article 903, which for a long time now—I think the first case of that sort goes back to 1941; as far as the board of higher education is concerned—has been held to mean in court interpretation that a witness who, as an officer of the city of New York, pleads self-incrimination as an excuse for not answering questions about what he does in his official capacity, has automatically by that very plea, as he spoke those words, discharged himself. In other words, that clause has been held to be self-executing. So all that happens under that particular provision is that after a survey of the transcript has made it clear that that is the kind of testimony that really was given, that testimony is recognized as a fact that took place in the light of the prevailing law.

In other words, the dismissal is really recognized as having taken place when the testimony was offered; and all these men knew that, because they had all been warned of that before they went down.

Mr. Morris. Dr. Gideonse, how have Communists attempted to infiltrate your faculty during the time that you have been president of Brooklyn College?

Senator Smith. Before we proceed with that, Mr. Chairman, should you not inquire if this witness objects to having this proceeding televised? I do not believe you did.

The Chairman. I did not inquire in this public hearing, but, Dr. Gideonse, you have no objection to this proceeding being televised or your picture being taken?

Dr. Gideonse. No. It is all right.

Mr. Morris. Before I repeat that question, Dr. Gideonse, this is not the first legislative inquiry into subversion among your faculty that you have experienced; is that right?

Dr. Gideonse. No, sir. Right after my appointment, things broke loose in New York State and City, and I therefore am in some ways an experienced veteran in these matters.

Mr. Morris. I see. Will you tell us what happened on this other occasion that you alluded to in your answer?

Dr. Gideonse. May I go into the history of it just a little bit?

Mr. Morris. I wish you would, very fully, Dr. Gideonse.

Dr. Gideonse. Brooklyn College, of course, is a very young college and a huge college. It has grown, I think, more rapidly in a short period of time than any other comparable institution in the United States. It was founded in 1930. That, of course, is the first year of the depression, and I think it is an important thing to keep in mind. It was founded without a campus and without buildings, and as the enrollment grew by leaps and bounds, overflowing the river from City College and Hunter College, the sister colleges also operated by the city of New York, the college was housed in office buildings, in lofts, here and there in downtown Brooklyn.

Since the budget was very bad in those days, all this rapid growth, the homogeneity of a campus, was also accompanied by the hiring of a very large number of teachers at extraordinary low salaries, many (550) of them tutors, at \$1,200 a year. All of this, of course, has a bearing upon the situation that I found when I was appointed.

We had then just moved into a beautiful new campus, new grounds, but we had a situation on our hands that was clearly one of sharp infiltration by various camouflaged units of the Communist Party.

The moment I arrived at the campus, it was clear that a problem was in my hands. The reception by that particular group had been unfriendly before I had accepted the offer. As a matter of fact, I knew that the Teachers' Union, which was then quite a force, and had, I believe, something like 130 members on the Brooklyn College faculty, had protested to the board of higher education the report of my appointment. Since the board had made friendly assurances to them, or so I was told, I wanted to make it very plain indeed, so there would be no misunderstanding, that those friendly assurances were misplaced; and, therefore, before the appointment was approved by the board, I made it very clear to the members of the board with whom I negotiated that if they had the understanding that I was going to live in peace with the Teachers' Union, they were quite mistaken; that I knew their record, was very familiar with their background, and expected to be in more or less continuous war with them, and if that displeased the board we had better not go through with the appointment.

I was told by both Dr. Carman and Dr. Tead on behalf of the board that they were not concerned with that at all; that they were convinced that I would handle those things in an appropriate professional manner, and that they would back whatever I encountered and found necessary to do.

Mr. Morris. Dr. Gideonse, may I break in there? You said you were acquainted with the record of the Teachers' Union at that time.

Dr. Gideonse. Yes.

Mr. Morris. I wonder if you would explain. Had any public action been taken against the Teachers' Union by any organization?

Dr. Gideonse. I don't recall any public investigations, but I am reasonably alert to what goes on in my own profession, and I remembered John Dewey's activities in con-

nection with the Teachers' Union, and the remarkable leadership and the courage with which he persisted in that leadership in exposing the Communist infiltration. That must have been at least 2 years before I went to the Brooklyn College.

Mr. Morris. You went there in 1938; is that right?

Dr. Gideonse. 1939. And then there was another big scrap in New York City in which Dr. Lefkowitz was one of the leaders, and that certainly made the newspapers with plenty of detail for anyone who really wanted to inform himself.

In these matters, it is my experience that reiteration to the point of nausea is required until the people wake up to the fact of what is going on. I might therefore have had the background, but I am sure that in 1939 when I came to Brooklyn, a very large number of perfectly honorable teachers who had no ideological affiliations with the Communist Party at all, were members of the Teachers' Union. One of the very great benefits of the Rapp-Coudert investigation was that that particular committee came equipped with legal talents, with a budget that made it possible to hire investigators, so it could dig (551) underneath and bring out some of the facts with regard, first to the Teachers' Union and its conduct and behavior, and also the kind of conspiratorial conduct that is characteristic of the Communist nucleus of that organization.

Mr. Morris. In other words, Dr. Gideonse, your original assessment of the political nature of the Teachers' Union was borne out by the subsequent events, particularly by the record of the Rapp-Coudert committee, whose activities you have just now mentioned; is that right?

Dr. Gideonse. Yes, sir. More than that, the benefit of pitiless publicity, to use Woodrow Wilson's phrase, was well illustrated, because I think in that period in Brooklyn, the enrollment of the Teachers' Union dropped from some-

thing like 130-odd—of course, I am going now on what I hear; they don't give me their membership figures—to less than 30. Of course, the difference is the group that was naive and had been led by the nose and now saw in the testimony what kind of an organization this was.

Mr. Morris. Dr. Gideonse, at that time the Rapp-Coudert committee testimony brought out that certain members of your faculty were in fact members of the Communist Party; is that right?

Dr. Gideonse. That is right, in my administrative and private judgment, but was not right in the sense that they proved it with enough legal validity so that I could act on it.

Mr. Morris. I see. In other words, at that time, as I recall, Dr. Gideonse, there was a member of your staff who admitted in sworn testimony that he had been a member of the Communist Party, and proceeded to relate the names of others who had been in the same unit of the Communist Party with him?

Dr. Gideonse. That is right.

Mr. Morris. That is Professor Grebanier, as I recall.

Dr. Gideonse. That is right.

Mr. Morris. Could you tell us what administrative difficulties you personally encountered in the face of that testimony?

Dr. Gideonse. That is a long story. You mean with regard to my discharge of my official responsibility?

Mr. Morris. You have indicated that in your personal opinion you felt that the evidence was sufficiently probative, but legally you were not able to take any action. I thought that was your position.

Dr. Gideonse. That is right. Now that I see what you mean by the question, let me again revert to the fact that I am, as a public administrator, not like a private-college president, who has much more discretion and leeway. I

am under the by-laws of the board of higher education, and I am under the State-tenure law, the most rigorous protection of academic tenure anywhere in the United States, public and private colleges included. In order to act on a case of what, in this case, would really be perjury, and certainly therefore is conduct unbecoming a teacher—irrespective of whether party membership was legal or not, it was perjury, and that I don't think there will be any quarrel about at all—one would need, so my legal advisers told me, at least 2 witnesses, not 1—that the court procedure and precedent showed that these cases were otherwise thrown out, and then one had, of course, that whole situation to go through all over again; or 1 witness and significant corroborative evidence.

(552) With regard to three of these gentlemen, we had significant corroborative evidence. Charges were preferred. It is very interesting and significant that the kind of conspiratorial conduct that we have in these cases, they all have the same lawyer. The lawyer presumably knows that these are the cases on which we had a little more than the others. Therefore, a marginal witness could perhaps stand up as a strong witness in a case where there was corroborative evidence, and then perhaps he could be used on the other cases. These three men, under the discipline that the party imposes, all resigned when the charges were published. They never used their legal rights to a trial, which was held out to them and in which they could have had their own lawyer. They just resigned when the charges were published. Therefore, we did not have the chance to go through the test of the witness, you see, under strong conditions; and that, of course, weakened the likelihood of using him under more marginal cases.

Anyway, under legal advice, we did not go through with the others.

There are additional problems, if you are interested in those. The moment you have in that set of circumstances,

which is now history, a witness who does cooperate, you have on the part of the party and its machine an organized campaign to make life unpleasant for that witness, most extraordinary and to me very instructive. I had not imagined anything like that would be possible, but one actually had to protect the witness by the machinery of the college.

Mr. Morris. Dr. Gideonse, some of those professors and members of your faculty who were involved in the investigation by New York State in 1941, have subsequently been brought before our committee, have they not?

Dr. Gideonse. That is right.

Mr. Morris. This time, rather than deny the charges—which I believe these people did at that time, did they not?

Dr. Gideonse. Right.

Mr. Morris. Suppose you tell us what they did. I have here clippings in front of me, one from the New York Times of January 4, 1941, headed, "Five Professors Deny Communist Links." Among the five are Dr. Harry Slochower, Murray Young, and Dr. Frederick Ewen. They are some of the people listed in this particular article. Those professors and members of your faculty have been called before this committee and, instead of denying, they invoked their constitutional privilege against incrimination.

Dr. Gideonse. That is right.

Mr. Morris. So the situation here before our committee is a bit different from the one that New York State experienced in 1941. Do you have any reason why there was a different attitude taken by these different professors?

Dr. Gideonse. I faced that particular question finally, officially, when the last two were suspended, because there began to be a feeling on the part of some of my associates that suspending them just under article 903 of the city charter had the appearance of acting on a mere technicality.

Mr. Morris. In other words, now in addition to having—previously, I think you described it that you were satisfied in your own mind with the proof that had been adduced against these people, but still you had no effective legal remedy.

(553) Dr. Gideonse. That is right.

Mr. Morris. Now you have an effective legal remedy, and you would like to do something more, all in the interest of safeguarding what may be someone's personal rights or liberties?

Dr. Gideonse. That is right. Also in the interests of making it plausible that the college administration, and behind it the Board, were acting on the grounds that were not just superficial little technical pretenses. The difficulty with that, of course, is that one gets beyond the evidence known to the general public, although one may be within the evidence known to oneself. I therefore, in this last case, issued a statement of about a page and a half in which I wanted to give some background as the reasons that played a role in making use of the technicality.

Mr. Morris. Will you read that into the record for us?

Dr. Gideonse. I would love to do so, but I want to tell you before I read it that I had the typical New York State difficulties with this statement. I was even told by one of the press services, after they had had it read to them, that in their judgment, under some legal decisions in New York, this was a statement that would expose the press service to financial damages, and so forth. That is why they didn't run it. That gives you a picture. You know, perhaps, of the feature of the food decision in New York State, and of the difficulties a public administrator is under when you are handling this kind of material.

Mr. Morris. You realize, Dr. Gideonse, you will have no such difficulty here, because privilege adheres to your statements here.

Dr. Gideonse. The statement was issued, anyway, and I told these gentlemen I would be very glad to have a legal test of the matter. I feel very sure that the evidence is available.

I quote:

These teachers were questioned by the Internal Security Subcommittee of the United States Senate on February 24, 1953, and I—that is, the president of the college—have examined the transcript of the hearings. There is nothing new about the operation of section 903 of the New York City Charter. As far back as May 12, 1941, it was established in a similar case that a teacher who, on grounds of self-incrimination, refuses to answer questions regarding his official conduct has himself terminated his employment by his refusal to testify. This provision of the charter, in other words, is self-executing. These are in my judgment clearly cases of the same type, in which the college administration—and ultimately the board of higher education—simply recognizes the facts of the case in the light of the governing law.

These cases do not involve issues of academic freedom or freedom of thought. Twelve years ago both these men swore in the Rapp-Coudert hearings that they were not members of the Communist Party. If they had now admitted that they were members of the party, they would have raised a basic issue about their testimony before the Rapp-Coudert committee. If they had repeated their previous testimony, they could foresee that testimony now available to the Senate subcommittee would make charges of perjury unavoidable. They therefore chose to appeal to the fifth amendment with a smokescreen of language designed to make their action appear as a defense of freedom and democracy rather than a carefully planned avoidance of perjury charges.

These are not issues of freedom or of legal technicalities. Wholly apart from the provisions of the city charter and from the flagrant disregard of the Board's specific instructions to cooperate with the legislative committee, this is clearly a matter of unprofessional conduct or, in the language of the governing statute, of "conduct unbecoming a teacher." The basic issue in such cases is not even concerned with the question of the wisdom or the legality of retaining or appointing teachers who are members of the Communist Party. It can be stated in the simple language I used at the time of the Rapp-Coudert investigation, (554) that is to say: Can teachers be trusted in a public and professional capacity if they perjure themselves—irrespective of whether they are Republicans, Democrats, or Communists? The principle can be regarded as well established. The only thing that is new at this time is the evidence that is becoming available as the result of the subcommittee's activities.

Mr. Morris. Dr. Gideonse, therefore it has been apparent to you that Communists have attempted to infiltrate your faculty during the time that you have been president of Brooklyn College?

Dr. Gideonse. A more correct statement would be that they certainly had infiltrated it before I was appointed, and that I had to deal with the problem that resulted. As far as I know, efforts to introduce new members of the party in the last few years have been very infrequent. I can think of only two, and they were stopped. It is possible there were some cases so well concealed that I know nothing about them.

Mr. Morris. So you took a very strong position back in 1941 against the activities of the Communists who were on your faculty and the Teachers' Union in general. The

Teachers' Union, you said, at its peak amounted to about 130 members, which membership was reduced after that particular inquiry.

Did the Communists do anything? Did they retaliate in any way against your department at that time?

Dr. Gideonse. Almost from the very beginning, and since they had very considerable influence in some of the key activities on the campus, including the student newspaper, which is one of their favorite sources of infiltration, a rather unpleasant atmosphere in that respect prevailed for quite a while. At the time of the Rapp-Coudert hearings, they picketed my home.

Mr. Morris. Would you tell us about that picketing, please?

Dr. Gideonse. Oh, this was done at regular hours, several days, a typical picket line, wearing masks. I had the impression that these weren't students at all. It was supposed to be a student picket line. It looked more like regular party ringers they picked up somewhere in Manhattan.

Mr. Morris. You mean the people in the picket line wore masks?

Dr. Gideonse. That was to suggest, of course, as the Communist Party always does, that these issues were about something other than communism. I don't know of a single campaign out in the open for the Communist Party. They always tie in with some issue that happens to give some concern to other people, to see if they can't make something out of it in the way of recruiting activity.

Mr. Morris. At that point, Dr. Gideonse, what issue did they use at that time?

Dr. Gideonse. The issue that they were using at that time was the argument that my speeches—I happened to be something of a specialist in international relations—were manifestly a support of Mr. Roosevelt's warlike policy, and that therefore I was a warmonger, and the whole Repub-

lian investigation of the colleges was concerned with war-mongering, and therefore they wore gas masks, you see, to emphasize the fact that this was really a pacifist demonstration of peace-loving people. This, therefore, must have been before June 22, you see, because then, of course, the line changed and it would require something else.

(555) Mr. Morris. Did the gas masks serve a double purpose, do you think? Did it conceal the identity of the picketers as well as giving this extraneous element to the performance?

Dr. Gideonse. It might certainly be read that way. On the other hand, anonymity is rather easy to achieve in our very large urban institutions. You must remember that right now, Brooklyn College has some 21,000 people, who use the campus every day. So it is not necessary to wear a mask not to be recognized.

Mr. Morris. Dr. Gideonse, there have been newspaper accounts of the fact that your home was bombarded with telephone calls, and your wife received phone calls, and you did. Are those news accounts generally true?

Dr. Gideonse. Yes. They definitely did to us what the party very often does when it has that kind of an issue on its hands. That is, they try to wear down the man or woman who is at the center of the resistance, and that consists, for instance, of making your telephone useless to you, or calling you up at all hours of the night so that the next morning you will be weary and perhaps will lose your temper on some occasion, and that, of course, would give them a new issue. It is a very well-known—they call it a "telephone picket."

It included, incidentally, sending telegrams, one of which was rather shocking to my wife because it arrived when I was not at home, which announced a death in the family. All sorts of techniques with which to demoralize or undermine the resilience of the individual involved.

Mr. Morris. Was the American Student Union active in this performance?

Dr. Gideonse. Yes; they were very active in it, and very much a part of the agitation, because one of the very first things that we had to cope with in those days was the close relationship between the Teachers' Union leadership and the American Student Union so-called leadership. Those organizations dovetailed, and they acted more or less on the same purposes.

That is part of the strategy of the party, of course. The party always, it seems to me, builds up a new agency when the old one has been completely exposed. Then no innocents joined it any longer, so it becomes useless, and a new innocent front, or transmission belt, whatever the language is, is set up whose purpose appears to be different from the old one, so that naive and innocent people can be induced to join it by the selection of some issue that they happen to be interested in. That might be an issue of some racial problem, or some war and peace problem, or a question of student fees, or what have you.

Then, of course, you have gradually to expose that group again as really operated by the same inner circle. That is what makes it so difficult in the beginning to handle the new front, because the new front is deliberately set up to be enticing to innocent people, and in the early period, therefore, very many people are members of that new front who are completely innocent, because it would not serve their purpose if they weren't.

The Chairman. Dr. Gideonse, do you consider that educators should consider themselves a self-sufficient community, or should they feel a deep sense of responsibility to the parents of the country in an hour of grave crisis? I would like your opinion on that.

(556) Dr. Gideonse. I think, Senator, that the question answers itself, although I would like to make a distinction.

Where you are dealing with graduate schools, professional schools, there the faculties have students who are adults, who are presumably able to take care of themselves, discriminating what kind of propaganda is thrown at them. But if we are talking about colleges, junior colleges, the overwhelming majority of the students are below 21. The faculty is obviously in the position that we technically describe as in loco parentis, that is, we take the place of parents while the students are entrusted to us. In a period in which it is unfortunately true that a very large number of families and a very large number of churches no longer have any hold on young people, it means that the college's responsibility is enlarged to the extent to which these other agencies no longer play that role, and the responsibility is to my mind today rather terrifying. It certainly is a very real responsibility. It is our job to see to it that these youngsters in our charge are safeguarded from spurious and scurrilous and camouflaged contact the way we would do in our own home. I can't see any argument about that at all.

The Chairman. I take it, then, that is your opinion that the schools and colleges of the United States play a vital part in the world-wide struggle against communism and totalitarianism?

Dr. Gideonse. Yes, sir.

The Chairman. What part would you say they play?

Dr. Gideonse. I am a very enthusiastic member of my own profession, and I should say that I think their role is probably more important even in this cold war stage on the verge of hot war than the Armed Forces themselves, because that kind of conflict is perhaps decided in a sense by armament, but, after all, armament doesn't mean very much if there is no purpose and will behind it. The colleges concerned as they are with the top drawer of talent for the country—2,500,000 in college right now in the Uni-

ted States—are obviously either consciously or unconsciously a very important part in clarifying national will and purpose. If this is a struggle; in the end, about ideas—I like to call it a struggle for the soul of men, because that is what it seems to me to be—then clarifying national ideas of self and what our purpose is, is vital. Then the Communists are right in making so much of trying to confuse the colleges, too, because they know that, too, and they try to confuse the clarity of national thinking by their infiltration.

The Chairman. Senator Smith, do you have any questions?

Senator Smith. Yes, I have 2 or 3.

Doctor, I judge from what you said that you have followed fairly well the hearings of this subcommittee on the educational situation. I also judge that you are familiar, from what you said a moment ago, with the Rapp-Coudert committee in New York State. Is it your feeling that the work of that committee and the work of this committee has been such that you could cooperate with those committees, and that the work was really worth while insofar as not only the welfare of the particular group of people in the country, but the country at large; that you felt it was really worth while and that you could cooperate with the endeavor of this Senate committee?

Dr. Gideonse. As a matter of fact, Senator, when the Rapp-Coudert committee was set up, I was enthusiastic about having it set up, because (557) it was perfectly clear to me that the nature of the kind of thing we were then coping with was then so badly understood by even the members of my own staff, not to speak of the general public, that one needed the kind of investigational talent, legal and other talent, in order to dig underneath and give evidence of the kind of concealed and camouflaged conduct that was involved. The average college teacher is in-

clined to think that the other fellow is just as honest and as simple as he is, and that he is going to be honorable. My experience has been that when you put this particular assignment in the hands of a faculty committee, where I think it belongs if you could assume that they were minded to dig in the way it requires, the faculty will ask some questions, and if they get answers they will assume that the man who answers is honest, and then if they have a little doubt, they do what they did in my case. They say, "Will you put those answers in writing?" Then a document is produced in which the answers are put in writing, and that is filed away. That is supposed to be the end of it.

Of course, the Rapp-Coudert investigation, and now latterly some of the things that you have put on the books, have proved that those replies in writing were utterly and completely invalid, and therefore I welcomed having a body that would have the kind of talent at its disposal which the faculty committee does not, that would take this other-than-professional conduct—because that is what we are talking about—and expose it for what it is. I have the same feeling with regard to this committee. Your committee has been, as far as I am concerned, very helpful to us at Brooklyn College, because you have helped us to remove some of the lags of that residue of 1939-40 that we had with ourselves all that time, which we couldn't do anything about under the law. Now you have supplied the evidence that made it possible to do it.

May I add something to that beyond that statement?

Senator Smith. Yes. Go ahead.

Dr. Gideonse. I think one of the reasons why there is such a flurry in some circles about the operation of this committee is that there is so little understanding of the nature of the job done. Senator Jenner made a statement sometime in February—I secured a copy of it just this

afternoon, but I had read it—on February 24, a statement on the purpose of this committee. I had really to go to work to get the text of that, because the newspapers didn't carry very much of that. It was not flamboyant. It did not have anything to do with witnesses. It was a statement of purpose.

I have watched your hearings, and I have read this statement of purpose. I find them completely in accord with one another, and I think if there were some varied reiteration of this statement of purpose so that it would be understood that your committee there said that you are not interested in anything that is negative to academic freedom—that, as a matter of fact, you are interested in protecting academic freedom; you are not interested in taking away the responsibility for the local policing of the institutions throughout the country—in fact, you are interested only in putting on the books here testimony, and I am using my language now, restating it, testimony about conspiratorial conduct, and you are then leaving it to the local institution—which the Senator even described as the first line of defense—(558) both in its faculty and in its board, to judge, to evaluate that testimony and to act on it. You went out of your way to say that you have no interest in doing anything about the content or the method of teaching in the local institutions. You are not interfering with that. You are concerned with this conspiratorial evidence and putting it on the books, and leaving it to the local authorities to judge.

I know from my experience with our witnesses that you have made it a practice in every case to sift this evidence in private hearings before it comes to the public. You even warned me about the naming of people that might not have had the benefit before this public session started. I know from my own experience, too, that you have always allowed everyone who wanted it to have a lawyer in the private

session as well as in the public one, if he wanted to have it.

I think if all of that were clearly understood throughout the country, that the overwhelming majority of people interested in the schools and colleges would say there is absolutely no objection to that whatsoever. It is only because it is misunderstood.

You have this lunatic fringe on the left, to use the Roosevelt term, and you have another one on the right. They are both thoroughly propagandized, and they don't see what is going on in the middle. This is something going down the main line right in the middle. It is just a matter of putting evidence of unprofessional conduct on the books for evaluation by the local authorities. I think it would help if this committee reiterated that on several occasions.

Senator Smith. Doctor, I judge from what you have said up to now that you do not see any reason why the really sane and level-headed members of the teaching profession should not cooperate with this committee, and that they need have no fear of encroachment upon academic freedom, so-called. Is that your feeling today, after what you have observed about the committee's activities?

Dr. Gideonse. Yes, sir.

Senator Smith. I suppose you have noticed, as I have, that there is a tendency on the part of some well-meaning teachers who do not know the background of some of the movements around them, immediately to rush to the defense of any teacher who may be at all involved in one of these hearings. Do you know any reason why the teaching profession should not be willing to cooperate with us by the setting up of some body of their own; a committee, to work with us and help us to separate the wheat from the chaff, so to speak, in order that we might present always fairly, suggestions that come to us with respect to

deviation from loyalty of any member of the teaching profession?

Dr. Gideonse. The only reason that I know for not doing that is an incomplete understanding, which is still very widespread, not only of the nature of what you are doing, but of the nature of the problem itself. I think one has to keep in mind, Senator, that what we are talking about, this very real evidence of a measure of infiltration in some places, is something that is, after all, not characteristic of the overwhelming majority of American colleges. We have a House committee report on the AYD, for instance, that would be good evidence.

Senator Smith. That is American Youth for Democracy.

Dr. Gideonse. That is the Youth for Democracy report. That is as good evidence as I know of the extent to which that particular (559) Communist transmission belt has successfully penetrated. As I remember it, it enumerated at the time 60 chapters in 14 States, and 18,000 members. That, as far as I am concerned, is 60 chapters and 18,000 members too much, but that is what it was.

The number of colleges in the country is about 1,200. Sixty chapters is 5 percent. To be sure, they would be in the main, roughly speaking, larger and rather important colleges. That would be true. But 5 percent. Eighteen thousand is less than 1 percent of the total enrollment in the undergraduate colleges at the time.

It pays to look at that, because we are dealing with something that 90 percent—in terms of my arithmetic a moment ago, 95 percent—of American colleges don't know much about. They therefore hear, "American Youth for Democracy." "American" is a good word, "youth" is, and "democracy" is. It takes them a long while to realize that all three of the words are lies: that it isn't American; that it isn't youth—they are graybeards of the ideological sort, Union Square; and that "democracy" means totalitarian. It takes a long time for it to percolate. The aver-

age professor has experience which makes him a little shy of controlling anybody's thinking. The academic profession, after all, has dealt with efforts to curb critical thought, to curb the unconventional and the unpopular. He knows that that very often is just an effort to repress freedom of thought. He easily confuses what is a deliberate effort to undercut freedom of thought with what looks like an effort to stop liberals from having their age-old right to think liberal thoughts.

Senator Smith. Did you read Dr. Jones' statement of policy, the president of Rutgers University?

Dr. Gideonse. I did, sir.

Senator Smith. I thought he made it quite clear, and I wondered if you agreed with him, that there is a difference between an attempt to suppress freedom of thought and to hold a man responsible for his overt activities.

Dr. Gideonse. Yes, sir. I would say, sir, if I thought this committee was concerned with being critical of people who thought unpopular thoughts or concerned with the repression in general of the essential function of colleges and universities, and that is to maintain themselves as centers of independent thought, I would be the first to be very critical, indeed, of this committee; and if I had an idea that my board was trying to fire some teacher for that, it would have to accept my resignation before it could act on the dismissals.

A college president does that, I would say, if he is worth his salt at all, pretty much the whole year around, defends teachers for saying and doing and thinking things that he would not say or do or think himself. The price of liberty is eternal vigilance. That is the traditional formula. It also is the tolerance of the occasional jackass; and the jackass even has the privilege of thinking that you are one.

If you do not do that, you will find that your own privileges will very soon be restricted.

But that is not the case, and what we have to clarify in this particular issue is that here is a group that kidnaps our vocabulary, walks off with our sacred words, "freedom," "democracy," "rights," and so on, and then pours into that particular vocabulary totalitarianism, lying, untruth, perjury, whatever it is that you can get away with. (560) They are not a minority standing up for their rights. They never even pretend to have the courage to admit that they are what they are.

Senator Smith. Doctor, do you feel that the work of this committee has been helpful to you in eliminating communism from your faculty and from your campus?

Dr. Gideonse. I would say, unqualifiedly, "Yes."

Senator Smith. Have you suspended or did you suspend all the members of your faculty who refused to answer the questions of the committee?

Dr. Gideonse. I believe in every single case we did that, Senator.

Mr. Morris. The seven faculty members who have appeared here are Harry Slochower, Sara Riedman, Melba Phillips, Frederick Ewen, Murray Young, Elton Gustafson, and Joseph Bressler. They are the seven members of your faculty who have appeared before this Internal Security Subcommittee.

Dr. Gideonse. Yes, sir. Each and every one of those is one of the oldtimers that goes back to the Rapp-Coudert days.

Mr. Morris. Doctor, some of those have denied to you and to various authorities, have they not, that they have ever been members of the Communist Party? Are you acquainted with that?

Dr. Gideonse. Yes, sir.

Mr. Morris. The newspaper clipping that I alluded to before makes mention of the fact that Dr. Ewen and other members of the faculty submitted affidavits. Part of the affidavit reads:

I am not a Communist or member of the Communist Party, and I have never been engaged in any subversive activities at Brooklyn College or elsewhere.

Do you find it is the practice of these people to deny when they are talking to you in their conversations, when you question them about their activities, or even in this case in affidavits, their Communist Party affiliations?

Dr. Gideonse. I admit the theoretical possibility of meeting an honest Communist some day, but I have never met one yet. They are all, in my experience, invariably and on principle liars, willing to perjure themselves if they are in trouble.

Mr. Morris. Doctor, what I was trying to bring out was, have they in fact denied to you being members of the Communist Party?

Dr. Gideonse. Yes, several of those people have.

Mr. Morris. And yet when they appear before a properly constituted tribunal such as this Senate Internal Security Subcommittee, they have invoked their privilege under the fifth amendment rather than put a denial on the record.

Dr. Gideonse. I can tell you about one of these colleagues in some detail.

Mr. Morris. Will you do that, please?

Dr. Gideonse. He was a gentleman that I thought probably had an affiliation in terms of what we knew about him in the Rapp-Coudert days, and a faculty committee also had some suspicion about this. He was a good scholar, and with his students an effective teacher.

The time came when he was ready for promotion in terms of a comparison with other colleagues. Of course, the issue arose, since you can't prove these doubts, should we not waive them? Which is truly a very effective argument, and certainly in line with the old American tradition that you must be proved innocent until—et cetera. So a (361) faculty committee was set up to look into the merits of the case,

and in that case the faculty committee did a very thorough job for a faculty committee that cannot do an investigation of the FBI sort. They came to the conclusion, after much heart-searching, that this story about this man was probably untrue, but they had these doubts. So they made him write out, with his signature under it, very solemnly, all the things that he had told the committee about never having been and not now being a member of the party, and that was signed.

Then he was called a couple of years later—and we promoted him, by the way.

Mr. Morris. Are you going to name this man for us?

Dr. Gideonse. Yes. You have him.

Mr. Morris. Which one is that?

Dr. Gideonse. That is Professor Slochower.

When this particular gentleman was called, he came in to get advice from me, and I told him, "I don't see that you have a problem. You have told the faculty committee and you have told me that you were not and never have been. We have that from you in writing. You assured all your colleagues. You have led them all to believe that. All you have to do is go and tell that committee just exactly what you have told us and what we have in writing from you."

His reply to me was, "If I do that there, they will prove perjury on me."

That gives you a picture of the kind of morale that we are dealing with. These are not issues that are worthy of being considered by anyone who is really professionally interested in academic freedom. This is the academic gutter.

The Chairman. Senator Welker?

Senator Welker. Dr. Gideonse, based upon your experience as an educator, you know, as a matter of fact, that only a small percentage of the teaching profession are members now or have ever been members of the Communist Party?

Dr. Gideonse. Yes, sir.

Senator Welker. So, based upon that assumption, Doctor, and based upon your experience as an educator, I want you to tell us why the Communists have made such an active move and active effort to get into the school system throughout our land?

Dr. Gideonse. I would say there are two main reasons that I can see. One is that since the Communist Party is obviously an instrument of a foreign power, Soviet Russia—I don't think anyone has any illusions about that any more today—they are interested in demoralizing our youth, because it would presumably be, in terms of a conflict with Soviet Russia, of Russian interest to have a relatively demoralized American youth. Anything you could therefore do on the American campus to make American youngsters feel doubtful about the sincerity of our profession, our belief in freedom and democracy and equality, and so on, would help to demoralize American youngsters, and therefore America, in terms of world conflict.

Secondly, the more obvious one, that I think it is pretty clear that by the time someone has become 30 years old, his sales resistance to the sort of thing the Communist Party has to peddle has considerably increased. It is the late teenager—the maximum recruiting period is probably around 19 or 20—who is at the peak of his idealistic orientation. (562) In other words, they get them when they are at their best: You wouldn't want young people who didn't make mistakes of that sort, as a matter of fact. That is the time when they are gushing with enthusiastic devotion to something that is not immediately practical, not immediately vocational. That is the period when you have a maximum chance of inducing them to fall for the big, bold slogans that they always hold out as part of the merchandising.

Not at that stage do they tell them what they are really interested in. That comes later if they last in the party.

I think those are the 2 main reasons.

Senator Welker. I appreciate that very much, Doctor. Doctor, you realize that every member of this committee is a member of the bar in different jurisdictions in the United States, and as such they have taken oaths to champion the cause of the defenseless and the oppressed. I am particularly interested in your remarks which favored some of the activity; and I think most of the activity, of this committee.

Doctor, may I ask you this, then: What program could you suggest to us as a committee that would help us as a congressional committee to counteract communism which is penetrating and influencing our young, faculty members in some instances, in our universities and schools throughout this land?

Dr. Gideonse. I appreciate your asking that question, and I would like to answer apart from some of the things that I have said already, Senator, with regard to repeating and reiterating and clarifying the purpose of the committee, because I think that is one of the important things to get across to the country.

Senator Welker. I am certain that that is right, Doctor, and I would like to hear your testimony again on that.

Dr. Gideonse. The first part, then, would be to get that across: that you are not interested in any way diminishing the vital importance of the tradition of academic freedom. You are interested in making it clear that there is a certain kind of conspiratorial conduct which has nothing to do with freedom, which itself is subversive of freedom, and you are making evidence about that available here.

Then the second thing, I should think—here I am venturing very much, but if I were sitting where you are sitting, doing what you are doing, I think I would take the statement of principles—and I brought it along, hoping that you might ask me a question of this sort—the statement of principles on academic freedom of 1940 of the American Association of University Professors. This is the state-

ment that they print from time to time in their bulletin. This is the statement that has the agreement of the Association of American Colleges. That is the top 700 colleges of the country. It has the agreement of the Association of American Law Schools and, of course, some, I think, 40,000 members of the academic teaching profession in the American Association of University Professors. I reread it again the other day from the standpoint of your committee. It seems to me there isn't a word in the statement that you are in conflict with.

You could, I think—I don't want you to say "yes" to this now; you wouldn't, I think—but I think you might submit this to your counsel and deliberate on it, and I think you would find that it would be possible to say that this committee is based on those same (563) principles. We are interested in what the American colleges said they were interested in when they adopted this on behalf of all the boards of trustees and were interested in what these 40,000 members of the American Association of University Professors are interested in. But we would like to have you notice that the key things concerning the business we have before us here are not provided for in this document. That is to say, there is nothing in this document about restraints on freedom by organizations that teachers have joined themselves. All the things that are in the traditional statement of academic freedom are concerned with restraints imposed by college presidents, boards of trustees, wicked materialistic interests of one sort or another. Nothing is said about restraints of freedom imposed by organizations that members of the staff join on their own initiative. That is the problem you are concerned with. That is a problem that is not covered in this statement.

The Chairman. Dr. Gideonse, how long is that statement?

Dr. Gideonse. It is the 1940 statement of principles. It is about two pages of print, and then it is followed by the

1925 statement of principles which is incorporated, which is another page and a half.

The Chairman. I would like at this time to make that a part of the record of this committee, and I am going to ask our counsel to examine it and report to the committee what his interpretation of it is, whether or not it fits in with our ideals and objectives.

(The material referred to follows:)

ACADEMIC FREEDOM AND TENURE STATEMENT OF PRINCIPLES, 1940¹

¹ Since 1934 representatives of the American Association of University Professors and of the Association of American Colleges have met in joint conferences to discuss the problems and principles of academic freedom and tenure. At a joint conference in March 1936 it was agreed that the two Associations should undertake the task of formulating a new statement of principles on academic freedom and tenure which should ultimately replace the 1925 conference statement. Pursuant to this agreement three such joint conferences were held on October 4, 1937, January 22, 1938, and October 17-18, 1938. At the October 1938 conference a statement of principles was agreed upon. This statement was endorsed by the Annual Meeting of the American Association of University Professors on December 28, 1938, and has subsequently been known as the 1938 statement of principles. The statement with several amendments was endorsed by the Annual Meeting of the Association of American Colleges on January 11, 1940. These amendments by the Association of American Colleges made another joint conference of representatives of the two Associations necessary. Such a conference was held in Washington, D. C., on November 8, 1940. At this conference a consensus was again reached and the 1940 statement agreed upon. The only real difference between the 1940 statement and the 1938 statement is in the length of the probationary periods set forth as representing "acceptable academic practice." The probationary periods agreed upon in the 1940 statement are one year longer than in the 1938 statement. Please note the section of the 1940 statement under the heading "Academic Tenure (a) (2), and compare with same section in the 1938 statement (February 1940 *Bulletin*, pp. 49-51).

EDITORIAL NOTE.—Statement of principles concerning academic freedom and tenure formulated by representatives of the Association of American Colleges and of the American Association of University Professors and agreed upon at a joint conference on November 8, 1940. This statement was endorsed by the Association of American Colleges at its Annual Meeting on January 9, 1941, and is to be presented for endorsement to the Annual Meeting of the American Association of University Professors in December 1941.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher² or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

(564) Academic freedom is essential to these purposes and applies to both the teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically; (1) Freedom of teaching and research and of extra-mural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an

² The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

institution in fulfilling its obligations to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period teachers or investigators should have permanent or

continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) In the precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if

possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from (565) the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

CONFERENCE STATEMENT OF 1925

EDITORIAL NOTE.—Statement of principles concerning academic freedom and tenure agreed upon at a conference of representatives of the American Association of University Women, the American Association of University Professors, the Association of American Colleges, the Association of American Universities, the Association of Governing Boards, the Association of Land-Grant Colleges, the Association of Urban Universities, the National Association of State Universities, and the American Council on Education

in 1925. This statement was endorsed by the Association of American Colleges in 1925, the American Association of University Professors in 1926, and reaffirmed by the Association of American Colleges in 1935.

Academic Freedom

(a) A university or college may not place any restraint upon the teacher's freedom in investigation, unless restriction upon the amount of time devoted to it becomes necessary in order to prevent undue interference with teaching duties.

(b) A university or college may not impose any limitation upon the teacher's freedom in the exposition of his own subject in the classroom or in addresses and publications outside the college; except insofar as the necessity of adapting instruction to the needs of immature students, or in the case of institutions of a denominational or partisan character, specific stipulations in advance, fully understood and accepted by both parties, limit the scope and character of instruction.

(c) No teacher may claim as his right the privilege of discussing in his classroom controversial topics outside of his own field of study. The teacher is morally bound not to take advantage of his position by introducing into the classroom provocative discussions of irrelevant subjects not within the field of his study.

(d) A university or college should recognize that the teacher in speaking and writing outside of the institution upon subjects beyond the scope of his own field of study is entitled to precisely the same freedom and is subject to the same responsibility as attach to all

other citizens. If the extramural utterances of a teacher should be such as to raise grave doubts concerning his fitness for his position, the question should in all cases be submitted to an appropriate committee of the faculty of which he is a member. It should be clearly understood that an institution assumes no responsibility for views expressed by members of its staff; and teachers should, when necessary, take pains to make it clear that they are expressing only their personal opinions.

Academic Tenure

(a) The precise terms and expectations of every appointment should be stated in writing and be in the possession of both college and teacher.

(b) Termination of a temporary or a short-term appointment should always be possible at the expiration of the term by the mere act of giving timely notice of the desire to terminate. The decision to terminate should always be taken, however, in conference with the department concerned, and might well be subject to approval by a faculty or council committee or by the faculty or council. It is desirable that the question of appointments for the ensuing year be taken up as early as possible. Notice of the decision to terminate should be given in ample time to allow the teacher an opportunity to secure a new position. The extreme limit for such notice should not be less than three months before the expiration of the academic year. The teacher who proposes to withdraw should also give notice in ample time to enable the institution to make a new appointment.

(c) It is desirable that termination of a permanent or long-term appointment for cause should regularly

require action by both faculty committee and the governing board of the college. Exceptions to this rule may be necessary in cases of gross immorality or treason, when the facts are admitted. In such cases summary dismissal would naturally ensue. In cases where other offenses are charged, and in all cases where the facts are in dispute, the accused teacher should always have the opportunity to face his accusers and to be heard in (566) his own defense by all bodies that pass judgment upon the case. In the trial of charges of professional incompetence the testimony of scholars in the same field, either from his own or from other institutions, should always be taken. Dismissal for other reasons than immorality or treason should not ordinarily take effect in less than a year from the time the decision is reached.

(d) Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances.

STATEMENT CONCERNING RESIGNATIONS, 1929

The following statement was approved at the 1929 Annual Meeting of the American Association of University Professors:

Any provision in regard to notification of resignation by a college teacher will naturally depend on the conditions of tenure in the institution. If a college asserts and exercises the right to dismiss, promote, or

change salary at short notice, or exercises the discretion implied by annual contracts; it must expect that members of its staff will feel under no obligations beyond the legal requirements of their contracts. If, on the other hand, the institution undertakes to comply with the tenure specifications approved by the Association of American Colleges, it would seem appropriate for the members of the staff to act in accordance with the following provision:

1. Notification of resignation by a college teacher ought, in general, to be early enough to obviate serious embarrassment to the institution, the length of time necessarily varying with the circumstances of his particular case.

2. Subject to this general principle it would seem appropriate that a professor or an associate professor should ordinarily give not less than four months' notice and an assistant professor or instructor not less than three months' notice.

3. In regard to offering appointments to men in the service of other institutions, it is believed that an informal inquiry as to whether a teacher would be willing to consider transfer under specified conditions may be made at any time and without previous consultation with his superiors, with the understanding, however, that if a definite offer follows he will not accept it without giving such notice as is indicated in the preceding provisions. He is at liberty to ask his superior officers to reduce, or waive, the notification requirements there specified, but he should be expected to conform to their decision on these points.

4. Violation of these provisions may be brought to the attention of the officers of the Association with the

possibility of subsequent publication in particular cases after the facts are duly established.

— (Reprinted from the Bulletin of the American Association of University Professors for February 1941.)

Senator Welker. One final question, Dr. Gideonse.

You realize, then, that this committee is not interested in the thinking of liberals or the thinking of people who might disagree with the thinking of any member of this committee. We want them to have that freedom. In fact, our objective is to preserve that freedom of thought.

Dr. Gideonse. I fully appreciate that. As I said a little while earlier in the hearing, if I didn't have from your hearings the strong feeling that you not only say that that is what you believe, but that that is what you are doing, I would be myself concerned about the kind of flurry of excitement that exists in some quarters about this committee. I see no such evidence at all, and I appreciate that you are not concerned with the liberal, with the right to be critical, with the right to hold unpopular views; that this is not your interest at all. That you are concerned, as a matter of fact, with protecting genuine freedom of thought against the temptation of some few who (567) have sold their birthright as Americans for a mess of intellectual pottage, to a foreign power.

Mr. Morris. Dr. Gideonse, you have observed, then, that this committee is interested only in people who are actually formally connected with the American Communist Party and affiliated with the international Communist organization, is that right?

Dr. Gideonse. Yes, sir. That is all I have seen that you have been concerned with so far.

The Chairman. Senator McCarran, do you have any questions at this time?

Senator McCarran. I would like to have the doctor tell us the firsthand experience he has had, those on his faculty

or those on his campus, that he had reason to believe were Communists or had had Communist leanings.

Dr. Gideonse. Senator, the answer to that must be very unexciting. If you have personal experience with someone who is an honest liberal, who stands up and is flamboyantly a defender of something that he believes in, knowing that a lot of other people don't, then you have that kind of personal experience with that kind of colleague. These people aren't that way. They are relatively—as you watch them from the administrative angle in an institution like mine, with a faculty of about 700, they are below the horizon of visibility. They operate like moles underneath. You don't see them much. You don't hear them much. It is rather rare that you encounter them directly out in the open. The nature of that business is that of a disciplined conspiracy underneath.

I know of 1 or 2 cases to the contrary. A gentleman that you had up here, and who now has been suspended, whose name is Gustafson, who actually supervised the picket line in front of my home that we were talking about a little while ago. When he was questioned about it, of course, it was just an accident. He happened to live in that part of the city. But he seemed to be living there all the time and was constantly there keeping the picket line going and marching, and things like that.

I remember one of the others who rather amused me, because—his name was Ewen, also before your committee—in the days of the Rapp-Coudert investigation he made a big speech when the Rapp-Coudert investigation started, before a big audience in Brooklyn, in which he announced, among other things, his opposition to the Rapp-Coudert committee, of course, but he also announced that since the committee had started, I—that is, the president of the college—had clamped down the lid on the faculty and on the student body of Brooklyn College. That was quoted in the press. I had clamped down the lid.

I wasn't aware of any lid or any clamping down of any sort, so I called him in. I asked him what evidence there was for the statement that I clamped down the lid.

He equivocated a bit here and there. He had no evidence. There wasn't any. So he finally ended up by saying the evidence was that I had called him in. In other words, the fact that I asked him for evidence on a statement made the day before was evidence for the truth of the statement made 24 hours earlier.

That kind of logic, of course, is rather interesting. But otherwise, there are no colorful experiences. You have to go at this sort of thing (568) by indirection, just as the argument, for instance, that they are flamboyant distorters in class is false. The average member of the Communist Party is altogether too careful to do that. No amount of checking, if that would be desirable—and I would think it would be very incompatible under the conditions of running a good college—you would have to be a very learned and informed man indeed to know about the twisting. Without any twisting of instruction, a disciplined crew of this sort can give you concern.

To make it concrete, he may be teaching English composition. He may say nothing about Korea or about American foreign policy or Marxist ideology, but if he is teaching English composition he knows enough about that class to know that those four students there are the ones who are the most likely to be reachable by a Communist line. All he needs to do, then, in his recruiting capacity, is outside the class to give the names of those four to the student organizer, and the job has been done. That has nothing to do with what he did in his classroom as a teacher, you see.

The Chairman. Any further questions?

Senator McCarran. No further questions.

The Chairman. Senator Johnston, do you have any questions at this time?

Senator Johnston. Dr. Gideonse, you have impressed me here today by your remarks and your testimony. I think you realize fully the danger that we are facing here in the United States at the present time, the threat of communism in the schools and colleges. Do you really believe that the professors in the colleges that are opposing, say, the activities of this committee at the present time, realize fully the danger that we are facing from communism in schools and colleges?

Dr. Gideonse. No, Senator. I think the larger number of the people who are critical or concerned do not themselves realize the nature of the problem. They confuse communism with liberalism. They do not believe some of these things that I have been discussing here as derived from a place that actually had rather a strong dose of infiltration at that time, but which I think is very well under control now. They don't believe those facts unless they are really brought to them and they are shown the evidence of the details, and then something breaks.

Senator Johnston. The reason for that is because, as you stated a few minutes ago, the Communists work in secret all the time?

Dr. Gideonse. That is right.

Senator Johnston. I believe you compared them to a mole. Being from out in the country, I know a mole leaves a little sign, and you can run them down. But do you not believe they are more like termites than a mole?

Dr. Gideonse. They leave a little sign, too, but I leave you the choice in biology that is appropriate. I have no quarrel with it. The difficulty comes back to the same point, Senator. If you could use the instrument of pitiless publicity by reiterating and making available sworn testimony that shows the nature of this conspiratorial conduct as distinct from the behavior of someone who thinks unpopular thoughts, who is merely unorthodox, who has ideas of

his own, then I think you will, as you clarify that, make it clear to the country as a whole that this is something other than what they thought it was.

(569) Senator Johnston. Doctor, what is the purpose of the Communist Party, in your opinion, in infiltrating college faculties and college campuses?

Dr. Gideonse. Purely and simply to serve the ends of their political masters. They are an instrument of Russian foreign policy.

Senator McCarran. Mr. Chairman, I would like to ask a question, if I might.

The Chairman. Yes.

Senator McCarran. I do not want to interfere with the other Senators.

The Chairman. Senator Watkins, do you have any questions?

Senator Watkins. I have no questions.

The Chairman. Senator McCarran.

Senator McCarran. Doctor, I have been very much interested in your discussion here this afternoon. I wonder if it is true in your experience that the American people fail to realize that this Communist conspiracy does not work by and through the majority. The majority of the people of Russia today are not for the party. The minority, working continuously within the body politic, is the thing that has brought Russia to its present condition and will bring this country to that condition unless we are awakened to the situation.

In other words, one Communist in a group, if he is in a key position—and they always work for the key position—can do more harm than the group can undo in a lifetime. Do you agree with our theory in that regard?

Dr. Gideonse. Yes. I think it is like a rotten apple in a barrel. We all know what happens to the barrel in no time.

I don't quite agree with you, Senator, that we are in

quite so great a danger now. I think this thing is on the run, and we are in various ways smoking it out so effectively that I think among young people it is losing its appeal with astounding rapidity. I certainly do not feel unhappy about the position of American young people today with regard to the temptations coming from that side. In fact, I feel just the opposite. I feel happier about the present condition than I have for a long time; and I am not just an administrator, I also teach classes still as president of the college.

But you are quite right, they pretend to be democrats, with a small "d." They pretend to be in favor of freedom, and of course the literature of the party and its practice makes it perfectly plain, if you study it a bit, that that is not the fact.

They talk about democratic centralism, by which they mean that you take orders from the guy in the center. That is what democratic centralism means.

They talk a great deal about membership in the party, and that, I think, misleads a lot of American liberals who think, "If I am a member of the Democratic Party, I do not necessarily have to agree with Senator McCarran," which is true. Therefore, if I am a member of the Communist Party, I do not necessarily have to agree with whatever the big Pooh-Bah says." That isn't so, because "member of the Communist Party" means—and they always use this word—you are an agent of the party, an "agent." In other words, you get orders and do what the principal tells you to do.

(570) That makes some liberals think that therefore, you can be a member of the Communist Party and not be committed to a lot of these bad things we have been talking about today, that you reject. You can't. As far as there is evidence available—and there is plenty of it on the books—a member of the party takes orders in whatever it is the

party wants to give him orders in; and he can't even get out without being punished.

I suppose your committee knows that it is pretty well standard practice in the party—and this is one of the things that always gives me great concern when I am dealing with young people who have gotten involved in it—they make a special point of taking a young person who is becoming a member of the party in the sense of having been in for some months, who has gone through the first trials. Now they are perhaps going to charge him with something a little more important. In order to avoid that he should be shocked into dropping the party by the nature of the new assignment, they make a special point of getting that person involved in something nasty. That something nasty may have to do with taking moneys for something that he would gladly have done for nothing; it may have something to do with sex; with a large number of things. That is documented, not for the public. No one is told about that except the inner group. But the individual knows that somebody knows. So if the time comes when the individual wants to break with the party, the threat is held over his head, "This will be told on you."

That wholly evil force holds them within the discipline. It is sometimes a thing that governs my behavior when I know of some particular individual cases of this sort, because you have an awareness of that particular hazard as one of the things that at the age of 19 or 20 might wreck young life. You therefore have to approach the matter with some delicacy, a delicacy which I wouldn't at all advocate with a 50-year-old who is an old warhorse in party discipline.

Senator Watkins. May I ask a question?

The Chairman. Had you finished, Senator McCarran?

Senator McCarran. Just one more question.

Doctor, I am very much interested in your optimism. I

hope to share it. My experience over the past several years does not give me quite as much optimism as you appear to have. The experience, "It can't happen here," is a thing I am very much concerned about.

That same expression was made in countries today behind the iron curtain, and they were democracies, and their people were as loyal and as patriotic as any people could be. I would like to interest the American people in that expression, "It can't happen here." It can happen here. I think you would join with me in this thought; It could happen here. It can happen through a minority, if you please, if during times when we are off guard, when we let down our guard, when we lose the thought of the danger of this sinister thing, this conspiracy, we allow them to take over in groups, in colleges, in schools.

I have today in mind the fact that there is in the schools of America in certain States of the Union, as disclosed before another committee of which I happen to be a member, the Appropriations Committee, a movement that is decidedly communistic in line, and that is the so-called One World movement. I draw your attention to that, Doctor, because you are in a position where you can well afford to give it careful thought.

(571) Dr. Gideonse. I personally, Senator, have always been a little leary of some aspect of the federalist movement business, which is one reason why, although I am very much interested in the foreign policy of the United States, you will not find Harry Gideonse's name away back in connection with that particular movement or some aspects of it.

I would also say, however, that I am, from my personal experience with a large number of its leaders in and around New York City, convinced that that is not true of a very large group of the most interested personnel in the movement, and that it cannot be true that Communists have much to do with it today, because certainly the country.

that is the most firm in rejecting qualified national sovereignty in international relations is the Soviet Union. So while there may be some fuzzy thinking, and I am certain there is, in that movement, I can't believe, until I saw some evidence of it, that it is fuzzy thinking of the Communist-inspired sort, because the Communist Party must follow the Russian line, and the Russian line is very clearly against widened, broadened international authority over national governments.

Senator McCarran. If you destroy patriotism, Doctor, if you destroy patriotism in the United States—and that is undoubtedly the teaching of this so-called One World movement—you will have gone a long ways toward weakening our resistance to the Communist conspiracy.

The Chairman. Senator Watkins, do you have a series of questions?

Senator Watkins. I would like to inquire of the Doctor: Have you had any instances where faculty members who have been either members of the Communist Party or going along that line, have repented and recanted from their positions?

Dr. Gideonse. Oh, yes.

Senator Watkins. What is your attitude with respect to those men when they have once done that?

Dr. Gideonse. It is the attitude, Senator, that there is more joy in heaven over one sinner, et cetera, than over 99 of the righteous. Compassion, I think, is supposed to be a part of the American philosophy. For that matter, education is one of the purposes of the college. So nothing happens to such in individual. If he remains a live and resilient members of the faculty, he just moves right along with the others.

You had one of those before you in this committee, Professor Albaum. Right after that testimony, I heard—you see, there is a lunatic fringe, Senator, on the right as well

as on the left. The lunatic fringe on the left thinks every Communist is just a wee little liberal; and the lunatic fringe on the right thinks every liberal is a Communist.

Senator Watkins. I am speaking now of a genuine Communist who has apparently repented.

Dr. Gideonse. They thought this man ought to be fired, and they thought, to make it more serious, that this man should not be promoted. He happened to be on my promotion list just at the time your committee called him in. I put him through for promotion on the stipulated time just about 6 weeks after he testified, and nothing has happened, and I think the record is clear.

Senator Watkins. Did you make any examination or investigation to find out whether he actually has repented, or has just appeared to?

(572) Dr. Gideonse. I have known for years that he was a trustworthy and reliable member of the staff.

Mr. Morris. Dr. Gideonse knows that he appeared before this committee and gave full, frank, and candid testimony, and in executive session even gave additional testimony about his participation in the Communist organization, and therefore did considerable damage to the Communist organization.

The Chairman. We need more of them.

Senator Watkins. In other words, what I am trying to find out is: The door is not closed to them if they do repent?

Dr. Gideonse. Not at all. I would say Senator, really, in handling this problem you could do nothing more foolish than to punish people who now regret their former associations and cooperate with you. One of the first things that you must make crystal clear, if you want to find out about the content of the conspiracy, is that you are going to protect all of those who now regret their former conspiratorial conduct and cooperate with you.

Senator Watkins. I would like to ask you about publications on the campus of the Brooklyn College. Have you ever seen any publications there that the Communist Party used for propaganda purposes?

Dr. Gideonse. Senator, their chief method of indoctrinating the campus is an apparently unending flow of free leaflets that are distributed at the gate. Year after year and literally day after day, some 10,000 to 20,000 leaflets a day handed out at the gate to the youngsters as they come on the campus.

Senator Watkins. Can you name some of these publications?

Dr. Gideonse. Oh, no. They are just mimeographed literature or a printed folder about some specific issue. They are not published regularly. This is a leaflet on, let's say, the fees now charged, or it is a leaflet about Korea, or some speech that somebody has made that they don't like, or something about the President. Their campaign of misrepresentation, of course, is featured by always putting the responsibility for everything they don't like on one man, dramatize the President. In other words, every time the faculty committee does something they don't like, the administration of the college is blamed for it, and there is a leaflet at the gate.

This takes place now—by the way, one of the things that made me more optimistic is that this particular flow of literature—I used to call it the geyser of gush—at the gate has now dried up. There doesn't seem to be the life in the show any longer. But in the days when they were working us, when they were trying very hard to retain hold on the campus and when they were losing it, this was the standard practice.

Also, at times free Daily Workers would be handed out.

Senator Watkins. I was going to ask you about that, if you had received any of them. How were they distributed, ordinarily?

Dr. Gideonse. The standard distribution is through the newsstands, of course, but there would be somebody standing there and just giving them free.

Senator Watkins. Would they be the same persons?

Dr. Gideonse. No, I would think not.

Senator Watkins. Could you identify any of them with any of the subversive organizations?

(573) Dr. Gideonse. No, sir. This happens out of the jurisdiction of the college, outside the gate, and that is civil liberties and police-protected. There is nothing you can do about that.

Senator Watkins. Would there be any distribution on the campus itself?

Dr. Gideonse. No. That is contrary to all college regulations.

Senator Watkins. How did you enforce that regulation?

Dr. Gideonse. The student would be sent to the dean's office, et cetera, but that is never necessary or rarely necessary.

Senator Watkins. You never had any trouble in that respect?

Dr. Gideonse. I would say none to speak of, considering the size of the institution.

The Chairman. Senator Hendrickson, do you have any questions?

Senator Hendrickson. Yes, Mr. Chairman.

Dr. Gideonse; this committee has heard a lot lately about the subject of academic freedom. You have mentioned the subject 2 or 3 times this afternoon.

Dr. Gideonse. Yes, sir.

Senator Hendrickson. Would you care to give this committee a true definition of academic freedom as you understand it?

Dr. Gideonse. I have been a member of the American Association of University Professors for some more than

20 years, and I was president of the University of Chicago chapter when I was on the faculty there for two successive terms. I have served the association on one of its most important investigating committees, on the Yale University case. I think I know what the association means by it.

The association means by it that a scholar who has acquired tenure, permanent appointment, has the right to freedom to teach in the sense that he owes an explanation of what he does in that capacity only to his peers, his colleagues in the profession. That if there are any issues about that, the issues should arise before a committee of professors who determine, in terms of their professional understanding of his subject matter, whether or not he has sinned against the professional rules.

I think that is the heart of it, and it is as simple as that. In other words, it is an effort to protect the man who thinks a thought or writes a thought in his publications that may be provocative to the majority or dominant material or church groups in the community against that kind of influence.

Senator Hendrickson. I yield to the Senator from Utah.

The Chairman. You go ahead and finish your questions, Senator Hendrickson. We are trying to conclude here.

Senator Hendrickson. Doctor, this question may have been asked during my absence from the committee room. I would like to ask if, in your opinion, an active Communist can be a good teacher at all?

Dr. Gideonse. I would say, Senator, that if an active Communist should ever come under my observation who openly admitted that he was, it would be possible, because I think if you know that the man has this loyalty, then you can allow for a lot of the bias, and then you can get an interesting contribution to the diversity of opinion that is partly the heart of good education. I have never met, in academic life, a man who admitted that he was.

(574) In other words; that theoretical exemption I put it in because I can think of it as having some validity, but it doesn't occur in practice. In practice they are always underneath, and obviously a teacher who has underneath commitments of discipline to someone in scholarly matters is by definition unacceptable as a teacher. That is a kind of loyalty that is incompatible with a free mind and a free community of scholars.

As I said, in my experience they are always that way. I have never met one out in the open. Theoretically, I can think of that as an exciting kind of intellectual experience if you knew this man is that, "Now let's have the argument out in the open." But you never get it.

Senator Hendrickson. I was glad to hear you say, Doctor, that you agreed with Dr. Jones of Rutgers. I think he made one of the finest statements on this subject that I have seen anywhere.

The Chairman. Senator Watkins?

Senator Watkins. I am interested in the affirmative side. What, if anything, is done in your college to teach the dangers of communism, and to explain really what communism is?

Dr. Gideonse. I don't want any misunderstanding about Brooklyn College as it now stands. I think this situation, as things are now, is completely under control at Brooklyn College. As a matter of fact, I think we have rather a healthy reputation for being rather ruthless about things of this sort. It is only 2 years ago that we got blasted as being a police state in which fatal blows to freedom were struck, by the Civil Liberties Union, because of the manner in which we handled some Communist infiltration on our student paper. The situation as it stands is not a problem at Brooklyn College at all, facultywise or studentwise.

Senator Watkins. May I ask, do you think a college could properly have as part of its course to explain what communism is and what its dangers are?

Dr. Gideonse. I think any college worth its salt probably deals with communism in a large number of courses. We certainly do. We deal with it in Government courses, in economics courses, in philosophy courses, wherever it is relevant. If you want to understand the modern world—and that is presumably what a college is concerned with—you must give your students some understanding of what communism pretends to be and what it in fact is.

Senator Watkins. That is why I am asking the question. I am wondering what the college does to explain really what communism is and what its objectives are.

Dr. Gideonse. Big slices of our courses in Government and philosophy are concerned with Communist literature, the description of the Soviet Government, its influence in foreign affairs, and so on. I, in my own course, spend a quite considerable slice of time on communism, and I would say that that is what a college today should do.

It would be very silly indeed to try to fight communism by keeping it out of the curriculum. You can't waterproof the young American mind against the things that the newspaper every day rains down on it all day long.

Senator Watkins. I commend you for that point of view, because I think there ought to be an objective approach to all of these very problems, including communism.

The Chairman. Mr. Morris, do you have any further questions?

(575) Mr. Morris. Dr. Gideonse, do faculty members participate in the election of department heads at your college?

Dr. Gideonse. I think our bylaws, Mr. Morris, governing the faculty and student organization are probably the most democratic in the United States. Our faculty shares in administrative responsibilities in the widest possible sense, and one of the ways in which I have, I think, managed to overcome this difficulty in the history of Brooklyn

College is by always insisting that the policies that were hammered out were the policies of the faculty committees. Their effort is always to stick the president with the administration of this. Invariably, decisions are faculty-committee decisions. That is the way to win this fight. Give everybody a share in the experience so they all see the facts.

It is a little hard, because most people would like to be inert and do their own things and not be busy with it, but have opinions about it, anyway. But our system is one of sharing. Therefore, for instance, department chairmen are invariably based on recommendations of the department. It is true the president has the right to reject the nomination before it goes to the board, but I think it is true that, for instance, of the 23 or 24 chairmen now at the college, every single one was the choice of the department; not a single one of them was based on a veto by the president.

Mr. Morris. Dr. Gideonse, at the peak of the Communist strength in your college some years back, was the election of chairmen of the different departments a political issue that Communists were in fact engaging in?

Dr. Gideonse. At what time?

Mr. Morris. At the peak of the Communist strength.

Dr. Gideonse. Yes. They were very much interested in getting the bylaws revised in as extreme fashion as possible so the staff would have the exclusive say-so. One of their quarrels with me at the time I was being appointed—I was a professor at Columbia University at the time—was that they apparently had heard that I insisted unless I had, as president, some say over the matter, I was not interested in accepting the offer. The bylaws were changed at the time of my appointment so that this faculty participation became a matter of recommendation to the president, which he had the right to reject if he found reasons to state to the board for it, and, of course, they saw in that the beginning of some reorientation.

The Chairman. Doctor, on behalf of the committee, I want to thank you for appearing before this committee. You have given us a great deal of information. I am sure it has been beneficial to the committee and, I hope, to the public at large. Thank you very much.

(Whereupon, at 3:30 p. m., the hearing was recessed, subject to call.)

SUPREME COURT U.S.

MAI 1 1956

HAROLD B. WILLEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 23

HARRY SLOCHOWER,
Appellant,

-VS-

THE BOARD OF HIGHER EDU-
CATION OF THE CITY OF NEW
YORK,

Appellee.

JOINDER BY ATTORNEY GENERAL RICHARD W.
ERVIN OF THE STATE OF FLORIDA AS AMICUS
CURIAE IN PETITION FOR REHEARING FILED BY
THE BOARD OF HIGHER EDUCATION OF THE CITY
OF NEW YORK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 23

	)	JOINDER BY
HARRY SLOCHOWER,	)	ATTORNEY GENERAL
<i>Appellant,</i>	)	RICHARD W. ERVIN
	)	OF THE STATE OF
-vs-	)	FLORIDA AS AMICUS
	)	CURIAE IN PETITION
THE BOARD OF HIGHER	)	FOR REHEARING
EDUCATION OF THE	)	FILED BY THE
CITY OF NEW YORK,	)	BOARD OF HIGHER
<i>Appellees</i>	)	EDUCATION OF THE
	)	CITY OF NEW YORK

To The Honorable Supreme Court of the United States:

The State of Florida, acting by and through its Attorney General, Richard W. Ervin, hereby joins in the petition for rehearing filed by the Board of Higher Education of the City of New York.

INTEREST OF THE STATE OF FLORIDA

Although no law of the State of Florida is involved in this case before the Court, this Amicus Curiae is vitally interested in the issues and the principles involved and joins the Board of Higher Education of the City of New York in their petition for rehearing because of the im-

portance to the State of Florida and all other state and local governments, as this case relates to the power to regulate internal affairs and to prescribe qualifications and requirements to be met by public employees.

Since 1949 the State of Florida, through Section 876.05, Florida Statutes, has required the execution of a loyalty oath by applicants for state employment. In the opinion of this ~~Amicus Curiae~~ Curiae it is conceivable that the decision of the Court in this case could weaken the authority of the State of Florida to require the above mentioned loyalty oath and could subject such oath to attack and thereby become amenable to the reasoning of the Court as applied against the City of New York in its authority to regulate public employment.

It is respectfully submitted that the City of New York or any other governmental agency has the right to prescribe the qualifications and conduct of its teachers and other public employees in the protection of its governmental institutions from undesirable influences.

Appellant's right guaranteed by the Fifth Amendment was preserved since, as a citizen, he was not required to give testimony which would tend to incriminate him. However, as a teacher and public employee he forfeited his license to teach and hold public office by refusing to answer questions regarding his background. Section 903 is a reasonable requirement for a position of high public trust and should be sustained by this Honorable Court.

CONCLUSION

WHEREFORE, it is respectfully urged that the petition for rehearing be granted and that the order of the Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

RICHARD W. ERVIN,
Attorney General of Florida

RALPH E. ODUM,
Assistant Attorney General

JOHN J. BLAIR,
Special Assistant Attorney General

PROOF OF SERVICE

I, Ralph Odum, Assistant Attorney General of the State of Florida, hereby certify that on the 18th day of May, 1956, I served copies of the foregoing Joinder on the several parties thereto as follows:

1. Ephraim S. London, Attorney for Appellant, by mailing a copy to him at 150 Broadway, New York City, New York.
2. Appellee, Peter Campbell Brown, by mailing a copy to him at his office in New York City, New York.

RALPH E. ODUM,
*Assistant Attorney General
of Florida*